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NO. _____

IN THE

Supreme Court of the United States

October Term, 1983

EASTERN AIR LINES, INC.,

Petitioner,

vs.

ATLANTIC RICHFIELD COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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TEMPORARY EMERGENCY
COURT OF APPEALS
OF THE
UNITED STATES

No. 11-2
No. 11-3

EASTERN AIR LINES, INC.,
PLAINTIFF-APPELLANT/CROSS-APPELLEE,

v.

ATLANTIC RICHFIELD COMPANY,
DEFENDANT-APPELLEE/CROSS-APPELLANT,

RICHARD W. DYKE, dba WESTERN STATIONS CO., COLVIN OIL COMPANY and F. O. FLETCHER, INC., dba FLETCHER OIL COMPANY, AMICI CURIAE,

ASHLAND OIL COMPANY OF CALIFORNIA, ET AL.,
AMICI CURIAE

Decided: June 15, 1983
Entered: June 15, 1983

Hon. Donna S. Bold, Clerk

Temporary Emergency Court of Appeals of the United States

No. 11-2
No. 11-3

EASTERN AIR LINES, INC.,
PLAINTIFF-APPELLANT/CROSS-APPELLEE,

v.

ATLANTIC RICHFIELD COMPANY,
DEFENDANT-APPELLEE/CROSS-APPELLANT,

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COLVIN OIL COMPANY and F. O. FLETCHER, INC.,
dba FLETCHER OIL COMPANY, AMICI CURIAE,

ASHLAND OIL COMPANY OF CALIFORNIA, ET AL.,
AMICI CURIAE.

Appeal from the United States District Court
for the Southern District of Florida
No. 74-1207-Civ-JM

(Argued: April 14, 1983 Decided: June 15, 1983)

JAMES H. BRATTON, JR., Gambrell & Russell, Atlanta, Georgia, with whom DONALD L. RICKERTSEN and JOHN G. DESPRIET of the same firm and LAURENCE A. SCHROEDER, Walton, Lantaff, Schroeder & Carson, Miami, Florida, on brief for Plaintiff-Appellant Cross-Appellee.

ROBERT E. JORDAN, III, Steptoe & Johnson, Washington, D.C., with whom RICHARD H. PORTER, F. MICHAEL KAIL, SAMUEL T. PERKINS, CHARLES G. COLE, and JEANNE DAVIDSON of the same firm and JOHN R. LUCAS, JR., Atlantic Richfield Company, Los Angeles, California, on brief for Defendant-Appellee/Cross-Appellant.

NEVA T. CAMPBELL, Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, Oregon, on brief for *Amici Curiae*, Richard W. Dyke, dba Western Stations Co., Colvin Oil Company and F. O. Fletcher, Inc., dba Fletcher Oil Company.

WILLIAM H. BODE, Batzell, Nunn & Bode, Washington, D.C., with whom JOHN E. VARNUM and TOBEY B. MARZOUK of the same firm on brief for *Amici Curiae*, Ashland Oil Company of California, *et al.*

Before INGRAHAM, ESTES and BECKER, Judges:

ESTES and BECKER, Judges:

Eastern Air Lines, Inc. ("Eastern") filed suit against Atlantic Richfield Company ("ARCO") on September 19, 1974, to recover amounts allegedly resulting from overcharges in the sale of jet fuel from ARCO to Eastern at O'Hare field in Chicago from November 1, 1973 to October 24, 1974, and Love Field in Dallas from November 1, 1973 to January 12, 1974. ARCO was required to supply Eastern during this time pursuant to the Middle Distillate Fuel Allocation Program, 38 Fed. Reg. 28660, enacted under the authority of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note ("ESA") and the Emergency Petroleum Allocation Act of 1973, 12 U.S.C. § 754(a) ("EPAA"). Partial summary judgment was granted to Eastern on May 1, 1981, by United States District Judge Alcee Hastings. R. 1248.[1] A mo-

[1] Judge Hastings's Memorandum of Opinion and Order entered on May 1, 1981 was virtually *in haec verba* from the proposed findings filed by Eastern on April 14, 1981. *United*

tion to vacate the summary judgment order was filed by ARCO on May 7, 1981 (R. 1294) but was not acted upon before Judge Hastings removed himself from the case on October 12, 1981.

On December 17, 1981, the case was transferred to Judge Jacob Mishler, United States Senior District Judge for the Southern District of New York, sitting by designation. R. 1613. By Order dated December 28, 1981 (R. 2767), followed by a well-reasoned decision filed on January 12, 1982 (R. 1675), Judge Mishler granted ARCO's motion to vacate Judge Hastings's partial summary judgment order of May 1, 1981. On February 16, 1982, the case was heard by Judge Mishler. R. Vols. 13-20. By Memorandum of Decision and Order dated October 29, 1982 (filed November 2, 1982), Judge Mishler awarded Eastern $179,160 in damages against ARCO. R. 2597.[2] Final Judgment was entered on November 24, 1982. Eastern filed a Notice of Appeal with this court on November 29, 1982. R. 2772. ARCO cross-appealed on December 22, 1982.

The issues on appeal are:

1. Whether Judge Mishler properly vacated the May 1, 1981 partial summary judgment order entered by Judge Hastings.

2. Whether the District Court properly determined Eastern's class of purchaser and May 15, 1973 price.

States v. El Paso Natural Gas Co., 376 U.S. 651, 657, 84 S.Ct. 1044, 1047 footnote 4; Wright, *The Law of Federal Courts*, 4th ed., pp. 646-651, 656; ARCO Br. at 6, FN 8-9; Appendix to ARCO Br. at Tab 1.

[2] The antitrust claims asserted by Eastern in its Complaint were severed by Order of the District Court on July 8, 1975 (Record at 19) which provided that the antitrust claims would be stayed for a second, later trial.

3. Whether the District Court properly disallowed retroactive reallocation of costs by ARCO and properly computed damages resulting from the reallocation.

4. Whether ARCO violated the equal application rule by passing through too large a share of increased costs to Eastern.

5. Whether the District Court properly denied an award of attorney's fees, treble damages, and prejudgment interest.

Summary Judgment

Eastern contends that because Judge Hastings found that ARCO did not raise any questions of material fact [3] before his partial summary judgment order was entered on May 1, 1981, the partial summary judgment may not be vacated by a successor judge except for the most "cogent reasons." [4] Since Judge Hasting's May 1, 1981 order did not dispose of all the issues in the case,[5] we find Judge Mishler's vacation of it squarely within the provisions of Federal Rule of Civil Procedure 54(b) which states in part:

> When more than one claim for relief is presented in an action, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any

[3] Judge Mishler found that "many factual questions exist" which were "extremely complex" and that summary judgment was therefore "inappropriate." Memorandum of Decision, January 12, 1982, Record at 01712, notes 2 and 4.

[4] *United States v. Desert Gold Mining Company*, 433 F.2d 713, 715 (9th Cir. 1970).

[5] Judge Hastings's May 1, 1981 Order expressly reserved the issues of whether or not treble damages and attorney's fees should be awarded for later disposition. Record at 01287.

> order or other form of decision, however designated, . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The partial summary judgment order entered by Judge Hastings on May 1, 1981 clearly provided for future revisions[6] before becoming final and did not contain an express determination that there was no reason for delay or a direction for entry of final judgment provided in Rule 54(b). R. 01287. Therefore, Judge Mishler was fully justified in vacating the partial summary judgment order. This court need only evaluate whether Judge Mishler properly exercised his judgment and discretion "[h]aving in mind that one judge should not overrule another except for the most cogent reasons." *United States v. Dessert Gold Mining Company*, 433 F.2d 713, 715 (9th Cir. 1970).

We find that Judge Mishler took extraordinary care to explain his reasoned decision to vacate the partial summary judgment order. Memorandum of Decision, January 12, 1982, R. 01675-01717. Judge Mishler found that Judge Hastings had made certain erroneous factual findings and legal conclusions based thereon.[7] While recognizing that the controlling regulations were suspectible to differing interpretations,[8] Judge Mishler found Judge

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[6] The Order entered on May 1, 1981, provided that interest on the amount of judgment would accrue at the rate of 6 percent from October 24, 1974 until the date of *final* judgment in the action. The same order provided for revision of the damage award after disposition of the remaining issues if necessary. Record at 01287.

[7] Memorandum of Decision, January 12, 1982. Record at 01678-79.

[8] This court has previously noted the obvious complexity and "frequent correction, modification, change and clarifying rulings" of the applicable regulations in this case. *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1023, 1024-1062 (TECA 1977), *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98

Hastings had erred in his interpretation. "A determination by a second judge that the former presiding judge made erroneous rulings that will seriously prejudice a party provides a cogent reason to justify vacating the prior order." Memorandum of Decision, January 12, 1982, R. at 01678. Judge Mishler's Memorandum of Decision sets forth with specificity both his reasons for believing the prior order was in error as well as his determinations that genuine issues of material fact then existed.

Class of Purchaser and May 15, 1973 Price

Eastern contests the District Court's finding that ARCO established a May 15, 1973 price of 12.89 cents per gallon and contends that ARCO actually set Eastern's price at 11.55 cents per gallon.[9] The "maximum allowable price" at which products covered by the regulations could be sold was "the weighted average price at which the covered product was lawfully priced in trans-

(1977). And, we have repeatedly warned that "fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application." *Id.* at 1011, n.20; *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1065, n.87 (Em. App. 1978), *reh. denied*, 1979, citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952). At oral argument, counsel for both parties also voiced their trouble with these regulations.

[9] *See*, Eastern's Brief at 40-45. Eastern's argument appears to be that because a price of 11.55 cents per gallon appeared on an ARCO internal computer printout in 1975, and that this printout was later used as data by ARCO in recomputing recoveries in response to a Notice of Probable Violation (NOPV), ARCO therefore had previously made the determination that Eastern's base price was 11.55 cents. The record reflects that Mr. Richard Morse, in-house counsel for ARCO, wrote Mr. George Immoor, manager of fuel contracts and services for Eastern, on February 15, 1974 and plainly stated that Eastern's base price was 12.89 cents per gallon. See, Plaintiff's Trial Exhibit "PTE" 37.

actions with the class of purchaser concerned on May 15, 1973, . . . plus (a) increased product costs and non-product costs incurred between the month of measurement and the month of May 1973. . . ." 10 C.F.R. § 212.82. A "class of purchaser" is defined as "purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees." 10 C.F.R. § 212.31. In assigning purchasers to their respective classes of purchaser, a refiner may consider several factors to determine whether or not the transactions were similar enough to be classified together, such as "volume, grade, quality, location or type of purchaser, or a term or condition of delivery." 10 C.F.R. § 212.31.

Mr. Richard Morse, an in-house attorney for ARCO, made the determination that Eastern should be assigned to a class of purchaser with the Aviation Division of U. S. Steel. Mr. Morse testified that he considered location, volume, and other factors in concluding that Eastern more closely resembled the Aviation Division of U. S. Steel than any other purchaser of jet fuel from ARCO, and thus Eastern should have been placed in the same class of purchaser as the Aviation Division of U. S. Steel. Morse Tr. at 1362. The last purchase of jet fuel by the Aviation Division of U. S. Steel from ARCO on or before May 15, 1973, was on May 12, 1973 at a price of 12.89 cents per gallon [Joint Pre-Trial Stipulation ("JPS") Appendix A, p. 2; Defendant's Exhibit ("D. Ex.") 84], and ARCO billed Eastern throughout the relevant period at the 12.89 cents per gallon figure.

Eastern's contention that its proper May 15, 1973 price was 11.55 cents per gallon is based on the fact that the last sale of jet fuel from ARCO to Eastern prior to May 15, 1973 was at 11.55 cents per gallon on January 31, 1973 pursuant to a sales contract between the parties

which expired that day.[10] From that day forward Eastern was not a contract purchaser from ARCO. However, the regulations require that the parties have an "ongoing commercial relationship" on May 15, 1973, pursuant to which Eastern could be considered to have been a "present customer" of ARCO on that date before ARCO would be justified in using Eastern's last purchase before May 15, 1973 as a base price. *Pacific Supply Co-Op. v. Shell Oil Co.*, 697 F.2d 1084, 1088 (TECA 1982), and authorities cited therein. Since it is evident that Eastern was not a present customer of ARCO on May 15, 1973, ARCO had to place Eastern in a class of purchaser which did contain present customers on May 15, 1973. *Pacific Supply Co-Op. v. Shell, supra*, at 1088.

Consequently, Mr. Morse assigned Eastern to a class of purchaser with the Aviation Division of U. S. Steel. "It is well settled that a seller's classification of its purchasers will not be overturned by the courts or federal agencies unless the classification is unreasonable." *Pacific Supply Co-Op. v. Shell, supra*, at 1089, *citing Naph-Sol Refining Co. v. Cities Service Oil Co.*, 495 F. Supp. 882, 891-92 (W.D. Mich. 1980); *Champlin Petroleum Co.*, 4 DOE ¶ 80,101, at 80,523-24 (1979). The record reflects ARCO's consideration of the factors relevant to a classification of purchaser (Memorandum of Decision and Order, October 29, 1982, R. 02607-02611; Morse, Tr. at 1362), and we affirm the finding of Judge Mishler that the classification was not unreasonable.

Because ARCO was required to assign Eastern to a class of purchaser in existence on May 15, 1973, we find unpersuasive Eastern's argument that the 11.55 cents per gallon price for Eastern shown on an internal ARCO computer printout constituted a deliberate determination by ARCO of a base price for Eastern. See Plaintiff's

[10] The original supply contracts between ARCO and Eastern were entered into in April, 1969. These contracts expired by their own terms in January, 1973. JPS at ¶ 19, Record at 01732.

Trial Exhibit ("PTE") 171. We agree with the District Court that the evidence at trial showed that the computer printout was not a true reflection of the base price set by ARCO for Eastern,[11] and it would be unauthorized and manifestly unfair for us to force ARCO to sell to Eastern at its contract price at termination on January 31,

[11] Judge Mishler found:

> We also reject Eastern's assertion that ARCO actually made a determination that Eastern's May 15, 1973 price was 11.55 cents per gallon. Eastern relies on a single statement in the 1975 deposition testimony of Mr. William Shellem, who has been employed by ARCO since May 1974 as Manager of Government Compliance in Government Reports and Analysis Price Control. At the deposition, Shellem stated that he did not take part in the process of establishing May 1973 base prices, either before or after he joined the company. This fact was confirmed at trial by the testimony of Mr. Foster, for whom Mr. Shellem worked. (Foster Tr. at 1092-93.) However, when he was shown a computer printout dated April 18, 1975 which listed a price for Eastern of 11.55 cents, Mr. Shellem answered affirmatively when asked whether the 11.55 cents was the base price for Eastern.
>
> At trial ARCO presented several witnesses who explained the meaning of the prices listed on the computer printout. The computer program was designed by Mr. Roger Husband, Systems Development Manager for ARCO, to provide the initial data for the development of base prices by identifying the transaction on or closest preceding May 15, 1973 for each ARCO customer. The 11.55 cent price represented a computer record of Eastern's last transaction with ARCO. The information was used in computing recoveries and did not reflect the price actually charged Eastern nor any judgment as to base price. The effect of the erroneous figure in computing recoveries was an overstatement of recoveries for jet fuel. (Deft's Memo at 27-32; Foster, Tr. at 1041-42, 1068-72, 1080-82, 1086, 1259-60, 1262, 1306; Morse, Tr. at 1331-32, 1350-51, 1353-56, 1357-59, 1368, 1397-98 1425, 1482-83; Husband, Tr. at 1540-43; Deft's Exh. 59, 60, 61).

Memorandum of Decision and Order, October 29, 1982, Record at 02649-50, Note 4.

1973, because of its continually rising product costs before and after January 31, 1973.

Retroactive Reallocation

Eastern was awarded $179,160 in the District Court representing overcharges incurred because the court found that ARCO improperly retroactively reallocated banked costs to its other covered products bank in 1977 and 1979 to compensate for increased recoveries which were required to be retroactively realized by a succession of administrative rulings.[12] The challenged retroactive reallocations of costs in this case from the gasoline to other covered products banks total $70.3 million (PTE 1001, Chart B-1), and were reported by ARCO in 1977 and 1979 in its required refilings of FEO-96 forms showing recoveries on all covered products.[13] D. Ex. 123-134; PTE 123-137.

The District Court principally based its decision, that ARCO had impermissibly retroactively reallocated costs, on an administrative decision, *Tenneco Oil Co.*, 1 DOE (CCH) ¶ 82,512 (1977). Tenneco challenged a Remedial Order issued by the Federal Energy Office ("FEO") requiring the refund of over $12 million in overcharges on gasoline, asserting that during the relevant period it had available increased costs in its general refinery products bank which could have been reallocated to justify the price it charged for gasoline. The FEO stated simply:

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[12] Judge Mishler discussed these various rulings and their effects on ARCO's recoveries in his October 29, 1982 Memorandum of Decision. Record at 02624-27.

[13] ARCO first reported the effects of the administrative rulings in lump-sum adjustments to its FEO-96 forms for December 1974 through February 1975. Later in 1975, ARCO made an internal restatement of the data first reported in lump sums, reallocating it to previous months. At the same time, ARCO reallocated its recoveries. This data was used in the 1977 and 1979 refilings of ARCO's FEO-96 forms. *See* ARCO Br. at 26-27.

"This type of retroactive reallocation of increased costs to offset *overrecoveries* on a particular covered product has never been permitted under the price regulations." 1 DOE at 85,043. ARCO attempts to distinguish the *Tenneco* case by stating that it was Tenneco's reallocation of costs to compensate for an overrecovery of a particular product (gasoline) which was impermissible, whereas ARCO had reallocated its costs to the entire other covered products bank, in which the refiner was afforded his choice of which products would bear the increased prices. ARCO Br. at 31. We find the distinctions of *Tenneco* to be unpersuasive and agree with the decision of the District Judge that the retroactive reallocation of costs attempted by ARCO in this case was disallowed by the regulations.[14]

ARCO has argued that reallocation of costs was a permitted practice as evidenced by the fact that refilings of FEO-96 forms had previously been allowed by the agency. We agree with ARCO that the Preamble to 10 C.F.R. § 212.126(d), 44 Fed. Reg. 14,534 (March 13, 1979), reprinted in Regulations Preambles, *Energy Management* (CCH) ¶ 40,413, was intended to explain the new rule setting a firm deadline for all future refilings of FEO-96 forms. ARCO Reply Br. at 11.[14a] While we

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[14] The reallocation attempted by ARCO required prior permission from the DOE. *See*, Preamble to 10 C.F.R. § 212.126 (d), 44 Fed. Reg. 14,534 (March 13, 1979), reprinted in Regulations Preambles, *Energy Management* (CCH) ¶ 40,413.

[14a] Relevant portions of the Preamble to 10 C.F.R. § 212.126 (d) stated:

> "With respect to the type of revisions which may be made, a refiner will not be permitted to use the refiling procedures to circumvent DOE regulations or frustrate current DOE audits by, for example, reflecting arbitrary reallocation of costs in a prior period in order to avoid the consequences of an enforcement action. The allocation of costs to particular products in a particular month reflects the election of certain options by refiners provided for by the price rules. * * * The election of such allocation

recognize that refilings of FEO-96 forms were allowed, we hold this type of retroactive reallocation of costs between product banks to compensate for overrecoveries was not ever permissible under the regulations, as illustrated by the decision in *Tenneco, supra.* (See, Memorandum of Decision and Order, October 29, 1982, R. at 02637, and *Naph-Sol Refining Co. v. Murphy Oil Corporation*, 550 F.Supp. 297, 313 (W.D. Mich. 1982).)

Eastern contends that the damages awarded it on this issue should have totaled $946,108 rather than $179,160. Eastern Br. at 26. Eastern concedes that had ARCO made a refund of the overcharges resulting from the eventual disallowance of the retroactive reallocation of costs *at the time* the overcharges occurred, ARCO would only have had to refund $179,160. However, Eastern asserts, since the refund for overcharges is being made considerably after the fact, ARCO should now refund $946,108, even though the overcharges to Eastern never truly exceeded $179,160. Eastern Br. at 26.

The obvious fault in Eastern's reasoning appears to have been caused by its misinterpretation of how overrecoveries are stated on the FEO-96 forms. We agree with the District Court's finding that "each overrecovery is used to reduce the amount available for recovery in the succeeding month. Therefore, each month's overrecovery figure represents the *cumulative* overrecovery of the preceding period . . . ." Memorandum of Decision and Order, October 29, 1982, R. at 02638-02639. The overrecovery stated for October, 1974 of $26.9 million was the "cumulative overrecovery for the entire period."

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options, in turn, effect calculation of maximum allowable prices in subsequent months. Accordingly, in the absence of a final order or written permission from the Department, such reallocation of costs may not be reflected in the refilings of DOE cost allocation forms permitted during the one year period for refiling, or in the case of older forms, by June 1, 1979." Preamble to 10 C.F.R. § 212.126(d).

Memorandum of Decision and Order, October 29, 1982, R. at 02639. The $179,160 awarded Eastern is its proportionate share of the $26.9 million.

Eastern, however, added the overrecoveries from each month of the entire period resulting in a cumulative overrecovery of $143 million. See, PTE 1001, Chart B-1. The flaw in Eastern's method of computation, under which the $70.3 million disallowance of costs would yield $143 million in overrecoveries was aptly illustrated by an ARCO witness:

> The way I try to put it in a simple fashion was, suppose I loan you a dollar a day for five consecutive days; a dollar on Monday, a dollar on Tuesday, a dollar on Wednesday, a dollar on Thursday, and a dollar on Friday.
>
> At the end of the time, I wanted my money back. Using my methodology, you would owe me five dollars; one for each of the five days. Using Eastern's methodology, you would owe me a dollar for Monday, two dollars for Tuesday, three dollars for Wednesday, four dollars for Thursday, and five dollars for Friday; a total of fifteen dollars.

Lavin, Tr. at 1841.

We hold that the damages of $179,160 awarded Eastern because of ARCO's retroactive reallocation of its costs were correct.

Equal Application

Eastern asserts that it was charged an unequal share of the increased costs ARCO had available for passthrough during its period of purchase in violation of the "Equal Application Rule," which states in relevant part:

> In computing base prices for a covered product other than a special product, a refiner may increase its May 15, 1973 selling price to each class of purchaser . . . by an amount to reflect the increased product

> costs . . . provide[d] that the amount of increased product costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser. In apportioning any amount of increased product costs to covered products other than special products, a refiner may apportion the total amount of increased product costs to a particular covered product other than a special product in whatever amount it deems appropriate.

10 C.F.R. § 212.83(c)(1)(ii), 39 Fed. Reg. 1924, 1955.

The District Court found that, on the average, Eastern was not charged a larger share of the increased costs available for recovery by ARCO than ARCO's other non-contract jet fuel customers.[15] The parties stipulated both to ARCO's amount of recoveries and volumes sold to its non-contract jet fuel purchasers during the period (JPS ¶ 45 and Appendices D-G, R. 01741, 01756-59) and that ARCO had charged its contract jet fuel customers the maximum amount provided by their contracts, with minor clerical errors excepted. Additional Joint Pre-Trial Stipulation, R. 02259-02261; JPS ¶¶ 33-39, R. 01729.[16] The

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[15] Memorandum of Decision and Order, October 2, 1982. Record at 02620. Eastern also contends that ARCO failed to compute its maximum lawful price for Eastern by using the formula in the regulations, thus no valid assignment of increased costs to classes of purchasers was made. Failure to compute a maximum lawful price using the formula does not in and of itself result in an overcharge in violation of the regulations. *Longview Refining Co. v. Shore*, *supra*, at 1017-18.

[16] Purchasers of jet fuel with contracts setting a maximum lawful price are an exception to the rule that increased costs passed through to a product must be equally applied to each class of purchaser; contract purchasers of jet fuel from ARCO were not required to pay more than their contract price under the equal application rule. FEO Ruling 1974-12, 3 F.E.G. (CCH) ¶ 16,022 (1974); *TransWorld Airlines, Inc. v. FEO*, 380 F. Supp. 560 (D.D.C. 1974); *Air Transp. Ass'n of America v. FEO*, 382 F. Supp. 437 (D.D.C. 1974), *aff'd*, 520 F.2d 1339

District Judge then utilized the stipulated data to conclude that on the average, ARCO recovered 19.9 cents per gallon from other non-contract jet fuel purchasers, but only 17.4 cents per gallon from Eastern (D. Ex. 199; Memorandum of Decision and Order October 29, 1982, R. 02620) and therefore that Eastern had not been damaged in violation of the equal application rule.

However, Eastern was charged more than its equal share of increased costs during one month at O'Hare Field and two months at Love Field. D. Ex. 201. Judge Mishler determined that damages should not be asssesed for those months in which Eastern was charged more than its share because in other months it was charged less than its share, resulting in a net passthrough to Eastern of less increased costs than ARCO would have been permitted to assess. Memorandum of Decision and Order, R. 02658-59.

Eastern cites *Kerr-McGee Corp.*, 3 F.E.A. (CCH) ¶ 83,179, *aff'd* 4 F.E.A. (CCH) ¶ 80,577 (1976), as holding that the "overall" approach employed by Judge Mishler is not the proper standard for determining whether or not an equal application violation has occurred. *Kerr-McGee* held that a firm may not offset a customer who was overcharged against one who was undercharged to prove that in the aggregate, its purchasers were not damaged by an equal application violation. 4 F.E.A. ¶ 80,577 at 80,827-28. By contrast, Judge Mishler offset *months* of overrecovery from a particular purchaser against months of underrecovery from the same purchaser. We conclude that the method employed by Judge Mishler represents a correct interpretation of the regulations and agree that Eastern was not damaged in violation of the

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(TECA 1975). Therefore, the District Court, after ascertaining that all contract purchasers were charged the maximum their contracts allowed, focused only on whether increased costs were passed through to each of ARCO's non-contract purchasers of jet fuel in equal amounts.

Equal Application Rule because it bore less than its share of ARCO's increased product costs.

Pre-Judgment Interest

Judge Mishler denied the claim for pre-judgment interest because he found Section 210 of the ESA provided that when an overcharge was unintentional, Congress had placed a specific limitation on the remedy which was not meant to be exceeded by prejudgment interest. Memorandum of Decision and Order, October 29, 1982, R. at 02664, n. 19. We agree with Judge Mishler that prejudgment interest is not available where the amount of damages claimed to be due is uncertain. *Belcher v. Birmingham National Bank*, 488 F.2d 474, 478 (5th Cir. 1973). At all times during this litigation it was evident that the amount claimed by Eastern was the subject of great uncertainty, and it would be inequitable and unjust to make such an award in this case.

Attorney's Fees and Treble Damages

We affirm the decision of the District Court to deny an award to Eastern of three times the amount of the overcharge and attorney's fees. In this connection we hold that the findings of the District Court, on which it based its decision to deny this award, were not only not clearly erroneous under Rule 52(a) F.R.Civ.P., but were fully warranted by the evidence. The District Court properly concluded that willfulness is used in § 210 in the criminal sense. *Longview Refining Company v. Shore*, 554 F.2d 1006, 1012-1014 (TECA 1977), *cert. denied*, 434 U.S. 836, 98 S. Ct. 126, 54 L.Ed.2d 98. In *Evans v. Suntreat Growers & Shippers, Inc.*, 531 F.2d 568, 571 (Em. App. 1976), this court upheld a district court's refusal to award attorney's fees and treble damages where "[t]he findings show lack of intent to violate the Act and support the part of the judgment refusing to allow attorney's fees or treble damages," citing *Manning v. Univer-*

sity of Notre Dame Du Lac, 484 F.2d 501 (Em. App. 1973). Our conclusion is based on the following analysis of § 210 of the Economic Stabilization Act Amendments of 1971, 12 U.S.C. § 1904 note, and the review of the legislative history of § 210. Section 210, in the current statute, enacted in 1971, appeared earlier in a Senate bill, S. 2891, from which it was taken.

Analysis of § 210

§ 210 of the Economic Stabilization Act Amendments of 1971, 12 U.S.C. § 1904 note, is as follows:

§ 210. *Suits for damages or other relief*

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge. *Provided*, That where

> the overcharge is not *willful* within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.
>
> (c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title. (Emphasis added.)

The word "willful" is used expressly only in the proviso of paragraph (b)(2) of § 210 by reference to "willful within the meaning of § 208(a) of this title" and is clearly used in the criminal sense, as stated above. Section 208(a) states: "Whoever *willfully* violates any order or regulation under this title shall be fined not more than $5,000 for each violation." (Emphasis added.)

But, under the proviso, the effect of the absence of willfulness is to require the party bringing a civil action for an overcharge to first present to the seller or renter a *bona fide* claim for refund of the overcharge without repayment of the overcharge within ninety days. Conversely, by implication, the presence of a willful overcharge relieves the party bringing a civil action of the duty of presenting a *bona fide* claim for refund of the overcharge before commencing the civil action. And, further by implication, the presence of willfulness may be one of the circumstances warranting the exercise of discretion by the court to award treble damages and attorney's fees under paragraph (b)(1).

Legislative History

Furthermore, the legislative history of the Economic Stabilization Act Amendments of 1971 clearly shows that the Committee of the Conference of Managers of the

House of Representatives and of the Senate reconciling the differences in the proposed amendments between the House and Senate bills eliminated the provision in the House bill authorizing treble damages only for willful violations of the price control regulations. See the *Joint Explanatory Statement of the Committee of Conference*, 2 U.S. Code Congressional and Administrative News, 92nd Congress, First Session 1971, 2307 at 2310 stating:

> The House bill authorized consumers to bring suits to recover three times the amount of the transaction from anyone *willfully* violating the price control regulations. The Senate bill contained a similar provision, but authorized suits for damages of three times the amount of the overcharge. The conferees agreed to the Senate provision.
>
> The House bill provided that in the case of an overcharge which is *not willful*, no action for an overcharge may be brought unless the plaintiff has first presented a claim for a refund and has not received repayment from the seller within ninety days. The House bill also provided that the term "willful" shall have the same meaning as in the case of criminal willfulness. The Senate bill contained a comparable provision except that it applied to violations *whether or not willful* and required repayment within a reasonable period of time as opposed to ninety days. The Conferees accepted the House provisions. (Emphasis added.)

The Senate provision is the enacted § 210 in which the requirement of proving willfulness to recover treble damages and attorney's fees does not appear. Instead in current § 210 the court is given the discretionary power to award treble damages and attorney's fees except in the event of proof by the defendant "that the overcharge was not intentional *and* resulted from a *bona fide* error, notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error." (Emphasis added.) § 210(b)(2). So to deprive the court of its dis-

cretionary power to award treble damages and attorney's fees, the defendant making the overcharge must prove that (1) the overcharge was not intentional, and (2) the overcharge resulted from a *bona fide* error notwithstanding (3) the maintenance by the defendant of procedures reasonably adapted to the avoidance of such error.

In the absence of such proof by the defendant the court in its discretion may award treble damages and attorney's fees if it finds the overcharge was intentional or resulted from reprehensible or criminal conduct, or lack of procedures reasonably adapted to the avoidance of erroneous overcharges, or bad faith, or where required by equity and the ends of justice.

The District Court found that the defendant ARCO had proved that the overcharge was unintentional and, in detail and in substance, found that ARCO acted in good faith and "maintained procedures reasonably adapted to the avoidance of overcharges." It is true that the findings were not completely in the precise language of § 210(b)(2), but the detailed findings of fact show that the defendant ARCO fully proved the existence of those facts described in the quoted language of § 210(b)(2).

Therefore, the conclusion of the District Court that the award of treble damages and attorney's fees should be denied was correct.

The mandatory supply relationship created by the regulations between ARCO and Eastern was a compelled relationship, the fruits of which have been controversy from the start. This torpid litigation began almost nine years ago, and the record on appeal contains thirty volumes. We agree that "there are no inherently protracted cases, only cases which are unnecessarily protracted by ineffiecient procedures and management." [17] Judge Mishler's denial of attorney's fees and treble damages is sup-

[17] *Manual for Complex Litigation*, frontispiece (5th rev. 1980).

ported both by the statute and the sound application of discretion.

We find that Judge Mishler's decision, rendered after laborious study and consideration of a welter of statutes, regulations, rulings and the briefs and arguments of counsel fully "set things right" between the parties. *Johnson Oil Co., Inc. v. DOE*, 690 F.2d 191, 203 (TECA 1982), citing *Sauder v. DOE*, 648 F.2d 1341, 1348 (TECA 1981), and *Tenneco Oil Co. v. Federal Power Comm.*, 442 F.2d 489, 497 (5th Cir. 1971).

In light of all of the circumstances of this case, we are of the opinion that Judge Mishler's judgment should be and is hereby AFFIRMED.

SO ORDERED.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. 11-2 and 11-3

EASTERN AIR LINES,

Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD
COMPANY,

Defendant-Appellee.

ORDER

Filed July 18, 1983

Stephen M. Mancuso, Deputy Clerk

Before INGRAHAM, ESTES and BECKER, Judges.

O R D E R

Upon consideration of the Petitions for Rehearing and/or Suggestions for Rehearing En Banc filed by the Appellant Eastern Air Lines and the Cross-Appellee Atlantic Richfield Company,

IT IS HEREBY ORDERED that the Petitions for Rehearing are DENIED.

IT IS FURTHER ORDERED that the Suggestions for Rehearing En Banc are DENIED. The mandate is to issue July 25, 1983.

FOR THE COURT:

Donna M. Bold
Clerk

by: /s/ Stephen M. Mancuso
Stephen M. Mancuso
Deputy Clerk

July 18, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 74-1207-Civ-JM

EASTERN AIR LINES, INC.,

Plaintiff,

-against-

ATLANTIC RICHFIELD COMPANY,

Defendant.

MEMORANDUM OF DECISION AND ORDER

Entered October 29, 1982

Final Judgment Entered November 24, 1982

JOSEPH BOGART, CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

----------x

EASTERN AIR LINES, INC.,

Plaintiff,

-against-

ATLANTIC RICHFIELD COMPANY,

Defendant.

----------x

Case No. 74-1207-Civ-JM

Memorandum of Decision and Order

October 29, 1982

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MISHLER, District Judge

In 1974 Eastern Air Lines, Inc. ("Eastern") instituted this action pursuant to sections 5(a) of the Emergency Petroleum Allocation Act, 12 U.S.C. § 754(a) and section 210 and 211 of the Economic Stabilization Act, 12 U.S.C. § 1904 Note, to recover alleged overcharges on 1973 and 1974 sales of jet fuel to Eastern by Atlantic Richfield Company ("ARCO").[1]

On May 1, 1981 United States District Judge Alcee Hastings entered an order granting Eastern's motion for partial summary judgment. Thereafter, the case was assigned to the undersigned pursuant to designation by the Chief Justice dated December 15, 1981 to sit in the Southern District of Florida. By order dated December 28, 1981 the undersigned vacated the May 1 order with a memorandum dated Jan-

uary 12, 1982 following. After trial conducted on February 16 through 22, 1982, the court makes the following findings of fact and conclusions of law.

Factual Background

Pursuant to two written contracts between ARCO and Eastern, ARCO supplied Eastern with jet fuel at Dallas, Texas ("Love Field") and Chicago, Illinois ("O'Hare Field") during the period from February 1, 1970 to January 31, 1973, when the contracts expired by their own terms. However, pursuant to the Middle Distillate Fuel Allocation Program, 38 Fed. Reg. 28660, established pursuant to the Economic Stabilization Act of 1970 and the Emergency Petroleum Allocation Act of 1973 which required the reinstatement of 1972 supply relationships, ARCO was again required to supply jet fuel to Eastern and Love Field

from November 1, 1973 through January 12, 1973 and at O'Hare Field from November 1, 1973 through October 23, 1974. Whether the prices charged by ARCO during the mandated supply periods were in compliance with the applicable regulations is the subject of this litigation.

Statutory and Regulatory Background

On August 15, 1970, the Congress passed the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 Note, which gave the President broad regulatory power to control inflation. On August 15, 1971 the President created the Cost of Living Council ("CLC") and delegated to it his authority under the Act. Despite price controls imposed by the President, and the CLC as part of Phases I, II and III of the Economic Stabilization Program, prices continued to rise. The price of refined petroleum pro-

ducts rose sharply because of the demand for crude and the escalation of foreign crude oil prices. On July 19, 1972 the CLC issued a notice of proposed rulemaking setting out proposed "Phase IV" regulations. The CLC issued general price control regulations in final form on August 6 and 9, 1973, but delayed the issuance of the Phase IV regulations applicable to the petroleum industry until August 22, 1973 because of its decision to modify those sections in light of industry comments it had solicited. Unlike earlier regulations, which were directed at controlling profit margins, the Phase IV regulations affected the specific price that refiners could charge for particular products sold to individual customers.

On October 6, 1973 war broke out in the Middle East. In retaliation for a decision by the United States to re-supply Israel

with weapons, the Arab oil-producing nations announced production curtailments and placed an embargo on crude oil sales to the United States. As a result, shortages of refined crude oil products became acute.

On November 27, 1973 Congress enacted the Emergency Petroleum Allocation Act ("EPAA") which gave the President power to deal with shortages of crude oil, residual fuel oil, and refined petroleum products, 15 U.S.C. § 751 et seq. By executive Order dated December 4, 1973 the Federal Energy Office ("FEO") was created and assumed responsibility for the administration's Economic Stabilization Program, including the Phase IV price regulations. On January 14, 1974 the FEO repromulgated Mandatory Price and Allocation regulations under the authority of the EPAA. On June 27, 1974 the Federal Energy Administration ("FEA") became the successor agency to the FEO. And

on October 1, 1977 the Department of Energy ("DOE") was created and became the successor to the FEA.

During the period of the mandatory supply relationship between Eastern and ARCO, the price which ARCO could charge was regulated by "Phase IV" price regulations which had been issued by the CLC under the Economic Stabilization Act, and subsequently, by the Mandatory Price and Allocation regulations issued by the FEO.[2] The Phase IV and Mandatory Price and Allocation regulations[3] set a formula for computing a "maximum allowable price." Generally, the regulations called for the identification of the "class of purchaser" of each customer, and for the establishment of a May 15, 1973 price for each class of purchaser. Refiners were permitted to increase prices over and above the May 15, 1973 price if supported by actual increased product costs.

The regulations differentiated between (1) "special products" which included gasoline, No. 2 heating oil and diesel fuel, and (2) "other covered products" which included jet fuel, residual fuel and distillates other than No. 2 heating oil and diesel fuel. The limitation on increasing prices of the products differed in some respects as to each class of products. For instance, the regulations permitted refiners to reallocate increased costs from "special products" to "other covered products;" but movements in the opposite direction were prohibited. Costs that were not recovered in the month following the month in which they were incurred could be "banked" for recovery in a subsequent month. The regulations permitted the establishment of three separate "banks" for unrecovered costs, two for particular "special products" and one for all "other covered products."

The regulations did not require a refiner to allocate costs available for recovery proportionately among all "other covered products." Rather, a refiner was free to apply the costs available for recovery by increasing the price of a few or a single "other covered product," provided that the amount of such increase was equally applied to each "class of purchaser" of that product. Beginning in February 1974, cost and recovery data had to be submitted to the FEO monthly on Form FEO-96.

With the statutory framework in mind we turn to the specific claims asserted by Eastern in this action.

I. The May 15, 1973 Price

The "maximum allowable price" at which a refiner could sell a controlled product was "the weighted average price at which

the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 plus (a) increased product costs incurred between the month of measurement and the month of May 1973. . . ." 10 C.F.R. § 212.82 (emphasis added). Arco determined the base price of jet fuel to Eastern as of May 15, 1973 to be 12.89 cents per gallon. Eastern claims that ARCO assigned Eastern to the wrong "class of purchaser" and, therefore, that ARCO's determination that Eastern's May 15, 1973 price was 12.89 cents per gallon was erroneous.

A class of purchaser is defined as "purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees." 10 C.F.R. § 212.31.

As explained by the FEA in Ruling 1977-5, 3 F.E.G. ¶ 16,069, May 15, 1973 was chosen as the baseline date in part because it was a period of "general stability of prices in the petroleum industry" between two rounds of price increases when "relatively normal market conditions in the petroleum industry prevailed. . . . Further, because classes of purchaser are determined and fixed with reference to base period transactions, a period of relatively normal market conditions would permit such classes to reflect normal or 'customary' price differentials between a firm's purchasers." Since the regulations were designed to reflect prices and differentials existing on May 15, 1973, it is clear that former or new customers which a refiner was compelled to supply as a result of the mandatory allocation program must have been assigned to the refiner's classes of pur-

chaser existing on May 15, 1973 "after determining which characteristics of a new customer most closely correspond to those of an already existing class of purchaser." Atlantic Richfield Co., 4 F.E.A. ¶ 80,550 (1976). Creation of new classes of purchaser for new customers was not authorized by the regulations.[4] Ruling 1974-1, 3 F.E.G. ¶ 16,011; Saber Petroleum Corp., 5 F.E.A. ¶ 80,544 (1977); Atlantic Richfield Co., supra.

Mr. Richard Morse, the ARCO attorney employed since 1971 who since 1973 has been responsible for furnishing legal advice with respect to Government price regulation programs, assigned Eastern to a class of purchaser consisting of the Aviation Division of U.S. Steel. Based on a delivery dated May 12, 1973, the delivery on or most immediately prior to May 15, 1973, the May 15, 1973 price for U.S. Steel was 12.89

cents per gallon. (J.P.S. Appendix A, p.2; D. Exh. 84). Accordingly, Eastern's May 15, 1973 price was set at 12.89 cents per gallon. In a letter dated February 1974 to Mr. Imoor, Manager of Fuel Contracts and Services at Eastern, Mr. Morse confirmed the 12.89 cents price.[5]

In assigning Eastern to a class of purchaser consisting of U.S. Steel, Mr. Morse considered the factors cited in the regulations for determining whether a comparable price was charged for comparable property pursuant to a customary price differential, specifically, "volume, grade, quality, location or type of purchaser, or a term or condition of delivery." 10 C.F.R. § 212.31.

Location has been recognized as the most important factor in determining class of purchaser. Champlin Petroleum Co., 4 D.E.O. ¶ 80,101, at 80,522 (1979), citing

FEA Ruling 1975-2, 3 F.E.G. ¶ 16,042. In Champlin Petroleum Co., supra, 4 D.O.E. at 80,522, the D.O.E. explained that factors, such as differing locations, that were considered in setting prices in the free marketplace may be the basis for establishing separate classes of purchaser even if the difference did not result in a significant price differential.

> Cost-related factors that result in customary price differentials usually warrant the establishment of separate classes of purchaser since a seller is presumed to recover higher costs associated with a particular type of transaction by charging higher prices. It should be recognized, however, that a seller could also base its prices on elements that are not readily identifiable as cost-related factors but which it nevertheless considers regularly in setting prices. For example, a seller may have a mechanism for establishing prices on the basis of the customer's location even though its costs of delivering product to various locations are not substantially different. If the location factor was a customary basis for establishing price distinctions under unregulated market conditions, it should be recognized in the establishment of class of purchaser categories. (emphasis added).

This latter aspect of the use of the location factor played a major role in Mr. Morse's determination. Mr. Morse considered the following: Atlantic Richfield Company was formed in 1966 by the merger of a west coast oil company called Richfield Oil Company, and an east coast oil company called East Richfield and Mid-Atlantic Corporation. After the merger the operational and marketing structures of the regions east and west of the Rocky Mountains continued to reflect the differing marketing practices of the two companies prior to the merger. As stated by Mr. Morse, "[t]he west coast market west of the Rockies is totally different from that east of the Rockies. So, we had separate marketing organizations. They had separate trade practices and conventions and customs." (Morse, Tr. at 1362). Because Love Field and O'Hare were located in ARCO's eastern

region, Mr. Morse concluded that he "could not apply a price from the west for a commercial airline." (Morse, Tr. at 1362). Accordingly, he examined data relating to jet fuel purchases in the eastern region.[6]

The next factor to be considered was the "type of purchaser." Prior to the fall of 1973 when it was required to supply Eastern with jet fuel, ARCO had abandoned the scheduled airline market for jet fuel in the east.[7] After Eastern ceased purchasing jet fuel from ARCO in January 1973, ARCO served only two customers in the region east of the Rockies who purchased jet fuel for aviation purposes, namely, the Federal Aviation Administration and the Aviation Division of U.S. Steel. The Federal Aviation Administration purchased jet fuel in connection with an experimental facility located outside Atlantic City, New Jersey. (DeWolfe, Tr. at 1499). The

May 15, 1973 base price for the Federal Aviation Administration was 13.88 cents per gallon. (Joint Pretrial Stipulation (hereinafter "J.P.S.") Appendix A, p.2). The Aviation Division of U.S. Steel purchased jet fuel in order to supply its own fleet of corporate planes and to supply other corporate and private jets using Mercer County Airport near Trenton, New Jersey. We see no basis to doubt Mr. Morse's conclusion that U.S. Steel as a commercial purchaser of jet fuel was more similar to Eastern than the government agency.

Mr. Morse also considered the volume purchased by U.S. Steel. U.S. Steel purchased jet fuel in truck-and-trailer load quantities. (Morse, Tr. at 1362; DeWolfe, Tr. at 1500, 1523). Under ARCO's schedule of prices, a customer might be charged an "extra" for taking less than a full trailer load, but no further discounts based on volume were available to the customer

who purchased one or more trailer loads. (Morse, Tr. at 1046, 1377-78; Foster, Tr. at 1063-64). U.S. Steel qualified for ARCO's lowest generally available price based on volume. Therefore, although Eastern purchased fuel in significantly higher quantity than U.S. Steel the difference as it affected price was inconsequential.

The regulations also instruct the recognition of customary price differentials which reflect differences in terms of delivery. In Ruling 1975-2, 3 F.E.G. ¶ 16,042, at 16,584, it was stated: "A firm may, for example, make its product available to some customers on a delivered basis and to others at its terminal. Such a difference in the terms of sale to otherwise indistinguishable purchasers would serve as the basis for a customary price differential between groups of purchasers, and thereby establish separate classes of

purchaser." Mr. DeWolfe, who during the pertinent time period was manager of aviation, government sales and national sales and who was responsible for overseeing all sales of aviation fuel east of the Rockies, testified that the prices provided to U.S. Steel were F.O.B. Atlantic Richfield's Philadelphia Refinery (DeWolfe, Tr. at 1495, 1531-33), which means that transportation charges to the airport were not included. (DeWolfe, Tr. at 1495, 1531-33; D. Exh. 87, 88, 90, 92, 94, 96, 98, 100, 102, 104, 106, 108). The prices quoted to Eastern, however, were "delivered" prices. This substantial benefit to Eastern minimized the significance of differences in terms of delivery.

Because of the complex nature of the task of assigning customers to classes of purchaser, the decision of the refiner is to be assessed under a test of reasonable-

ness. In Champlin Petroleum Co., 4 D.O.E. ¶ 80,101 at 80,524 (1979), it was stated:

> In making [class of purchaser determination] . . . a seller may frequently be confronted with a number of different but reasonable options for formulating its class of purchaser structure. The judgment reached by the seller should therefore not be overruled unless it is determined that the result reached was outside the range of reasonable options.
>
> * * *
>
> Accordingly, although certain class of purchaser categories may be more closely attuned to the overall regulatory purpose, a seller should not be compelled to restructure its classes if the classification it used reflected a reasonable judgment of the factors set forth in the regulations.

In assigning a new or former purchaser to a class of purchaser which existed on May 15, 1973 it is not necessary that the new purchaser "share all of the distinguishing characteristics of the existing purchasers with whom it is grouped but, only, that it most resembles purchasers in that class." Atlantic Richfield Company, supra, 4 F.E.A. at 80,697. The determination by Mr. Morse

that the characteristics of Eastern most resembled those of U.S. Steel, Aviation Division "reflected a reasonable judgment of the factors set forth in the regulations."/8

II. Equal Application of Increased Costs

Eastern claims that ARCO, in violation of the pertinent regulations passed through to Eastern an unequal portion of its determined increases in costs.

During the pertinent period the refiner price rule provided:

> (a) A refiner may not charge to any class of purchaser a price in excess of the base price of that covered product except to the extent permitted pursuant to the provisions of paragraphs (c) through (k) of this section.
>
> * * *
>
> (f) The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus (a) increased costs incurred be-

> tween the month of measurement and the month of May 1973 and measured pursuant to the provisions of § 212.83. . . .

10 C.F.R. § 212.82, 39 Fed. Reg. 1924, 1952-53 (Jan. 15, 1974).

The manner in which increased costs could be allocated was provided in 10 C.F.R. § 212.82(c), 39 Fed. Reg. 1924, 1955:

> In computing base prices for a covered product other than a special product, a refiner may increase its May 15, 1973 selling price to each class of purchaser . . . by an amount to reflect the increased product costs . . . provide[d] that the amount of increased product costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser. In apportioning any amount of increased product costs to cover products other than special products, a refiner may apportion the total amount of increased product costs to a particular covered product other than special product in whatever amount he deems appropriate. (emphasis added)./9

The purpose of the requirement that a determined increment be equally applied to

each class of purchaser, Trans World Airlines, Inc. v. Federal Energy Office, 380 F. Supp. 560 (D.D.C. 1974), aff'd, 520 F.2d 1339 (Em. App. 1975), was to preserve historic price differentials between classes. Phillips Petroleum Co., 2 F.E.A. ¶ 80,599, at 80,831 (1975). However, the regulatory purposes of the Act were to be carried out with a "minimum of economic distortion" and "no unnecessary interference with market mechanisms." Section 4(b)(1)(I) of the EPAA, 15 U.S.C. § 753; Trans World Airlines, Inc. v. Federal Energy Office, supra, 380 F. Supp. at 565. For this reason there exists an exception to the requirement of equal application of increased costs:

> To the extent air carriers happen to have contracts for domestic aviation fuel with the 1972 suppliers with whom they are required to deal by the FEO, which contracts provide for prices lower than the maximum prices which a refiner is permitted to charge under the FEO regulations, the FEO has not

> overridden such contract prices, although as noted above it has the power to preempt those contracts to effectuate its mandate.

Trans World Airlines, Inc. v. Federal Energy Office, supra, 380 F. Supp. at 565; accord, Air Transport Ass'n of America v. Federal Energy Office, 382 F. Supp. 437, 447 (D.D.C. 1974) (dictum), both affirmed at 520 F.2d 1339 (Em. App. 1975). Application of the rule excepting contract purchasers was clarified in FEO Ruling 1974-12, 3 Energy Mgt. ¶ 56,228, described as follows in Trans World Airlines, 380 F.Supp. at 564:

> Ruling 1974-12 sets forth a hypothetical set of facts under which Firm A, a refiner, sells jet fuel to Firm X and Firm Y, both air carriers. The May 15, 1973 lawful price to both carriers was $.20 per gallon and it is assumed that A has a private contract with X containing a ceiling price of $.25 per gallon but does not have such contract with Y. It is further assumed that A allocates "increased product costs" of $.17 per gallon to be used in computing jet fuel prices in April, 1974. During April, A therefore charges X only $.05 per gallon above the May 15, 1973 price since the contract ceiling

is $.25 per gallon, and charges Y $.17 per gallon above the May 15, 1973 price or $.37 per gallon. The FEO Ruling approves this practice as "equal application" of increased costs notwithstanding the fact that in April Y has had to pay a $.17 increase and X has only had to pay a $.05 increase.

The Ruling goes on to state that A, who has not charged and therefore not recovered $.12 per gallon of increased costs from X in April, may "bank" such costs and carry them forward to the following month when he may again pass them through to purchasers of his products. The example assumes that X has a total of $60,000 of such unrecouped or "banked" costs for April which may be carried forward to May. While the Ruling states (p.3) that such costs "need not be assigned to jet fuel in computing base prices for a subsequent month," it does not prohibit the assigning of such costs to jet fuel. To the extent they are assigned to jet fuel, carrier Y, without a contract, will have to pay more than $.37 per gallon even if there are no further increases in the cost of crude oil. Carrier Y will thus have to bear an even larger share of the increased costs compared with carrier X, which will still be charged no more than $.25 per gallon as it paid in April, due to the fact that X has a contract with price protection provisions.

The parties have stipulated (1) that ARCO maintained jet fuel supply contracts

with American, Delta and Northwest Airlines, McDonnell Douglas Corporation, Rohr Industries, Inc. and Signal Oil and Gas Company that were within the exception to the equal application rule, and (2) that, except for two minor clerical oversights, throughout the period from May 4, 1973 through October 31, 1974. ARCO charged these jet fuel contract customers the maximum amount permitted by the contracts. (J.P.S. ¶¶ 33-38; Additional Joint Pretrial Stipulation). Therefore, the equal application issue is reduced to determining whether ARCO passed through to Eastern a higher increment over its May 15, 1973 price than it did to other non-contract jet fuel customers. Mere failure of ARCO to uniformly charge an equal increment to each non-contract customer as required by the regulations does not constitute an actionable wrong for which Eastern can recover

under § 210 of the Economic Stabilization Act. Longview Refining Co. v. Shore, 554 F.2d 1006, 1022 (Em. App. 1977). Rather, the determination to be made is whether Eastern paid a higher increment than did ARCO's other non-contract customers.[10] The parties disagree both as to the methodology to make such a determination and the information relied upon.

We agree with ARCO that "[i]n order to assess whether there actually has been an equal application violation as to the entire period of Eastern's purchases, the proper approach is to determine the average recoveries for Eastern from November 1, 1974 through October 23, 1973 and to compare that figure with the average recoveries for Atlantic Richfield's other non-contract purchasers during the same period." (Defendant's Post-Trial Brief at 40). The word "recoveries" refers to

the amount of revenue received, during the period of measurement, in excess of the applicable May 15, 1973 selling prices. (Instruction for the Preparation of Form FEO-96, Part V, Line 14, PTE 106 at 10.)

The recovery figures for Eastern and ARCO's other non-contract purchasers and the volumes associated with these recoveries,/11 the only data needed to determine damages, are included in the Joint Pretrial Stipulation. (J.P.S., at ¶ 46 and Appendices F and G). As Mr. Lavin, a senior financial analyst with the ARCO government-compliance group, testified, the stipulated data was based on ARCO's examination of the actual invoices for each non-contract customer during the pertinent period which contained the volumes and revenues associated with each jet fuel sale. Resort to the basic source materials was the only method of accurately computing recoveries

for jet fuel since there is no readily available data which a refiner reported to the government detailing its pricing to non-contract purchasers of jet fuel. The FEO-96's do require the reporting of recovery data on Part V, Line 14. However, this data is in the form of a single aggregate figure for all other covered products. There is no separate reported figure for jet fuel; nor are there separate figures for recoveries from contract versus non-contract customers.

Defendant's Exhibit 199 reflects the stipulated figures and a computation based on those figures of the average recoveries per gallon for Eastern and other non-contract customers from November 1, 1973 through October 23, 1973.[12] The exhibit reveals that, on the average, ARCO recovered 19.9 cents per gallon from non-contract purchasers other than Eastern, but

only 17.4 cents per gallon from Eastern. Thus, on the average, Eastern was charged 2.5 cents per gallon less of increased costs than other non-contract purchasers.

Because over the period of its purchases of jet fuel from ARCO, the average recoveries in cents per gallon charged to Eastern were less than those charged to other non-contract purchasers Eastern has not been injured in violation of the equal application rule./13

III. Retroactive Reallocation of Costs

As discussed previously, in computing price increases for a particular "other covered product," a refiner may allocate to a particular product in the other covered products category not only costs associated with that product; the increased costs of any "other covered product" may be "reallocated" to that product to justify a price

increase. In addition, costs associated with the purchase of "special products" may also be reallocated to other products category to support increases in price of all "other covered products" or one particular "other covered product." 10 C.F.R. 212.82, 39 Fed.Reg. 1924, 1952-53; 10 C.F.R. 212.83(c), 39 Fed.Reg. 1924, 1955. If under its pricing system, a refiner fails in any given month to recoup the entire amount of its increased costs in the "special products" category or the "other covered products" category, the costs not recouped may be "banked" or carried forward and used to justify a price increase in a subsequent month. Such "banked" costs may be "reallocated" in the same manner as current costs would be if the refiner elects to do so. 10 C.F.R. § 212.83(d).

Eastern asserts that retroactive reallocations of costs that appear in revised

FEO-96 forms for the pertinent period filed by ARCO in 1977 and 1979 which did not appear in ARCO's original FEO-96 forms were not permitted by the regulations. Accordingly, Eastern seeks a refund for "over-recoveries" that would have appeared in the 1979 forms if not for the retroactive reallocations. /14

The FEO-96 form was designed to aid refiners in computing prices for the three separate product banks (See FEO-96 Instructions PTE 106 [App. III at 40]). ARCO began filing FEO-96 forms in 1974 as required by the regulations. About ten days after the close of each month, ARCO filed an FEO-96 form based on estimated data for that month and a revised FEO-96 for the previous month based on more accurate "actual" data. (Foster, Tr. at 1187-88, 1191).

These revised FEO-96 forms for the months during the mandatory supply relationship with Eastern, November 1973 to October 1974, have been admitted into evidence as Defendant's Exhibits 2 through 13. The key data from the original FEO-96 forms has been summarized in Defendant's Exhibit 47. (Foster, Tr. at 1094-95). ARCO reported overrecoveries in only two months, January and March of 1974. The two nonconsecutive overrecoveries did not amount to an overcharge. The regulations specifically provided that an overrecovery could be corrected by making a compensating adjustment to selling prices in the subsequent month. 10 C.F.R. § 212.83(d)(2). As explained in Longview Refining Company, 6 F.E.G. ¶ 56,253 (1975), the right to make the price adjustment was "in recognition of the fact that prices charged in a particular month are based in part on estimated

sales volume for the month, which may prove to be inaccurate, so that there would be a month-by-month self-adjustment." Compensating adjustments in the succeeding month were made for the two overrecoveries in January and March of 1974. Since there were never two consecutive months of overrecovery reflected in the original FEO-96 forms no overcharge occurred. (Morse, Tr. at 1460, 1465-66).

The original FEO-96 forms show only one reallocation between product banks--a reallocation of $2.7 million from the distillates bank to other covered products bank in December of 1973. Eastern does not challenge this reallocation. (Rushing, Tr. at 252).

Subsequent to the filing of the original FEO-96 forms, the FEA issued various rulings which required ARCO to make substantial retroactive adjustments in reported recoveries in the various banks.

Rulings 1974-17 and 1974-18, 3 F.E.G. ¶ 16,027 [APP. III at 11] and ¶ 16,028 [APP. III at 12] sought to provide guidance as to when differentials between customers would be viewed as "customary" price differentials within the meaning of the regulations pertaining to May 15, 1973 prices. Because, as stated by Mr. Morse, (Tr. at 1343), the rulings would cause ARCO to make a dramatic change in the way it conducted business, ARCO representatives tried to persuade the agency that, as a matter of law, this was a new regulation which should not have been given retroactive effect. Its efforts failed and the FEA issued a Notice of Probable Violation ("NOPV") against ARCO, (PTE 61 [APP. III at 35]), for its failure to comply with these rulings. The NOPV was withdrawn as a result of a compromise agreement between ARCO and the agency wherein ARCO agreed to reinstate

competitive discounts in all future prices charged to companies and to recompute its recoveries retroactively based on the recomputed base prices. (Morse, Tr. at 1344-48; PTE, 168, Clyman letter at ¶¶ 1 and 2 [APP. III at 43]).

The impact of the recomputation of recoveries was first reflected in the December 1974 FEO-96 form which showed a $44.9 million increase in recoveries from sales of other covered products. (Defendant's Exhibit 64 at 4; Foster, Tr. at 1191-92). As Mr. Levesque testified (Tr. at 1604-06), during the more limited period of time at issue in this lawsuit, the recomputation of base prices pursuant to the agreement increased recoveries for other covered products by $38 million. (Defendant's Exhibit 138).

Ruling 1974-27, 3 F.E.G. ¶ 16,037, required refiners to recognize recoveries

when petroleum products were consumed as refinery fuel, fuel in transporting crude as products, transferred to affiliated entities or sold for export to locations outside the U.S. All aspects of the ruling except that pertaining to refinery fuel were retroactive. That portion of the Ruling dealing with export sales was later declared erroneous. Ruling 1975-7, 3 F.E.G. ¶ 16,047 [APP. III at 16]. The regulations under Phase III, which were concerned with the overall percentage increase in the refiner's revenues, had not recognized internal transfer and consumption as a "sale." Accordingly, Rule 1974-27 was a dramatic departure. (Morse, Tr. at 1380-81).

The cumulative impact of Ruling 1974-27 was first reflected in ARCO's FEO-96 for January 1975, (Defendant's Exhibit 65), which showed an increase in recoveries from

sales of other covered products of $16.3 million. (Foster, Tr. at 1208-11). The February 1975 FEO-96 reflected an additional $23.8 million as a result of the bunker fuel treatment under Ruling 1974-27. (Defendant's Exhibit 66; Foster, Tr. at 1213-14).

Other rulings also had a net unfavorable impact on ARCO's reported recoveries in the other covered products bank. For example, the regulations called for the recognition of "landed" costs as including transportation cost. 10 C.F.R. § 212.83(b), 39 Fed. Reg. 1954, 1955 [APP. III at 4]. The final regulation adopted concerning the definition of landed costs provided that landed costs should be considered incurred at the time indicated by the refiner's customary accounting practices. 10 C.F.R. § 212.84(h), 39 Fed. Reg. 38364 (October 31, 1974) [APP. III at 7].

At ARCO this was the time of loading. Previous to the regulation ARCO had recognized these costs at the time of loading. (Morse, Tr. at 1385; Foster, Tr. at 1184). While this adjustment had an overall favorable impact on ARCO's reported costs, the impact on the other covered products banks in particular months was sometimes unfavorable in substantial amounts. (Levesque, Tr. at 1608-09; Defendant's Exhibit 139 at col. 3).

ARCO also had made substantial recomputations concerning the allocations of crude oil costs among various controlled and exempt products. Specifically, ARCO made adjustments based on the V-factor regulations promulgated by the government in April 1974. The V-factor had an unfavorable impact. (Levesque, Tr. at 1611-13; Defendant's Exhibit 139).

Cumulatively, the rulings and regulations had a net unfavorable impact on recoveries in the other covered products bank of $64 million and a net unfavorable impact on costs in that bank of $36 million, making the total adverse impact during the relevant time period $100 million. (Defendant's Exhibits 137, 138 and 139; Levesque, Tr. at 1603-08).

As noted previously, the consequences of the FEA rulings were initially reflected in certain "lump sum" adjustments to the FEO-96 forms contemporaneously filed for December of 1974, and January and February of 1975. (Foster, Tr. at 1189-94; 1205-18; Defendant's Exhibits 63, 64, 65 and 66). The same revised FEO-96 forms reflected lump-sum bank transfers. The FEO-96 for December 1974 contained a $67 million reallocation of costs from gasoline to other covered products. (Foster, Tr. at 1193;

Defendant's Exhibit 64). The FEO-96 for February of 1975 reflected a $16.8 million reallocation from the gasoline to the other covered products. (Foster, Tr. at 1215; Defendant's Exhibit 66).

In 1975 ARCO completed an internal restatement of its FEO-96 forms for the period pertinent to this case. (Foster, Tr. at 1219-20; Defendant's Exhibits 67-82). The restatement spread back the lump sum adjustments under the various rulings to the months to which they pertained. The restatement also spread back over those months the lump sum reallocations of costs between product banks reflected in the December 1974 and February 1975 filings. The 1975 restatement is summarized in Defendant's Exhibit 135. The 1975 internal restatements were shown to local auditors of the FEA. (Levesque, Tr. at 1656).

ARCO continued to make recomputations as a result of the interpretative rulings and other inaccuracies in its computations. However, there were no further reallocations of banked costs. In 1976 ARCO developed a computer program to more accurately spread back the earlier lump sum adjustments. (Levesque, Tr. at 1656). The restatements were supplied to FEA auditors as early as December 1976. (PTE 103 at 18 [APP. III at 39]; Levesque, Tr. at 1656).

In 1977 ARCO filed with the Department of Energy formal revised FEO-96 forms covering the months at issue. (Defendant's Exhibits 123-34; Levesque, Tr. at 1580-81). As indicated earlier, these formally submitted FEO-96 forms reflect the same reallocations of costs as the 1975 internal restatement. (Compare Defendant's Exhibit 123-34, line 17 with Defendant's Exhibit 135, line 17). In addition, the

reallocations contained in the 1977 refiling are the same as those disallowed by Eastern in its damage computation based on the 1979 refiled FEO-96 forms for that period. (Compare Defendant's Exhibit 123-34, line 17 with PTE 1001, Chart B-1, Col. 4 [APP. III at 47]).

The third set of FEO-96 forms for the pertinent period were filed in May 1979. (Tr. at 206; PTE 123-37). These forms contained the same bank reallocations as had the series filed in January 1977. As noted previously, the May 1979 filing provided the basis for Eastern's damage computations with respect to retroactive reallocations. (PTE 1001, Chart B-1, p.4 n.4 [APP. III at 47]). After the retroactive reallocations the FEO forms did not show any overrecoveries of costs.

In this court's Memorandum of January 12, 1982 vacating the entry of partial

summary judgment, we expressed the opinion that retroactive reallocation of costs was impermissible absent prior permission from the D.O.E. Despite the strong arguments proffered by ARCO in support of allowing the retroactive reallocation in this case and the equities presented, we adhere to our prior opinion that retroactive reallocation has never been permitted by the regulations.

In Tenneco Oil Company, 1 D.O.E. ¶ 82,512 (1977), a Remedial Order had been entered by the FEO against Tenneco directing it to refund overcharges of over $12 million upon a finding, that as a result of improperly calculating its May 1973 cost and quantity of purchased gasoline, Tenneco had sold motor gasoline at prices which exceeded the firm's maximum allowable selling prices during six months of the period June 1974 through January 1976. Tenneco

requested modification of the Order on the grounds that the FEA erred in calculating the amount of the firm's overcharges by failing to consider that Tenneco could have reallocated unrecouped increased product costs which were attributable to the general refinery products category to support its prices for gasoline during the period in which the overcharges occurred. Recognizing that during the period from January 1975 through January 1976 Tenneco could have reallocated a portion of its increased costs from general refinery products to the prices it charged for motor gasoline, the FEO nevertheless rejected Tenneco's argument, 1 D.O.E. at 85,043, finding:

> This type of retroactive reallocation of increased costs to offset over-recoveries on a particular covered product has never been permitted under the price regulations. Under the provisions of Section 212.83(e) in effect during the period involved in Tenneco's submission, a refiner which in any month charged prices for a covered product that resulted in the recoup-

ment of more than the total increased product costs calculated for that product pursuant to the refiner formulae in Section 212.83(c), was required to subtract the excess revenues from its May 15, 1973 selling prices to compute its base prices in a subsequent month. Therefore, overrecoveries of increased product costs were required to be eliminated by reductions in the firm's base price computations for the particular product involved and could not be transferred to other product categories, i.e., offset by underrecoveries of costs attributable to other product categories.

The distinctions between the facts in Tenneco and this case are insignificant. The fact that, unlike Tenneco, ARCO voluntarily recomputed its recoveries based on the various rulings cited while the discovery of Tenneco's overrecoveries was the result of an FEA investigation does not make inapplicable the principles underlying the Tenneco decision that overrecoveries on a product must be deducted from subsequent prices of the particular product and cannot be offset by underrecoveries in

another product category. In addition, we note that while it is commendable that ARCO voluntarily recomputed its costs and recoveries, in doing so it was fulfilling an obligation under the regulatory program to faithfully and accurately apply the regulatory provisions. Failure to do so might have resulted in a Remedial Order similar to that entered against Tenneco./15 Finally, ARCO produced much proof that the administrative interpretive Rulings which caused ARCO to recompute its cost and recovery figures did not present the common understanding of the regulations they addressed; and in fact, parts of those rulings were later invalidated. (Compare, e.g., Ruling 1974-18 with Ruling 1975-1; Ruling 1974-27 with Ruling 1975-2.) Such proof has demonstrated ARCO's good faith in making its original computations; however, neither ARCO's good faith nor the validity

of the interpretive rulings is pertinent to our consideration here. If the uncertainty of the proper application of the various regulations affected by the rulings was an appropriate basis to seek invalidation of the rulings that reflief should have been sought before the agency. Alternatively, if ARCO's good faith in applying the regulations and the difference of opinion between the industry and the administrative agency as to the proper application of the regulations provided a basis for ARCO to be excepted from the rule prohibiting reallocation, permission to retroactively reallocate costs should have been sought from the regulatory agency. This is not the proper forum to raise these arguments.

The promulgation by the administrative agency in 1979 of 10 C.F.R. § 212.126(d), 44 Fed. Reg. 14,534, 14,536,

did not create a right to retroactively reallocate costs. That section provides:

> (d)(1) Resubmissions and refining of reports by refiners. A refiner shall exercise due care and diligence in the preparation of cost allocation reports filed pursuant to this section. DOE will routinely accept resubmissions or refiling of such reports only within one year after the original filing or submission. Any entry contained in an otherwise timely report which purports to change or adjust retroactively an entry or allocation contained in a report previously filed or submitted shall be considered a refiling or resubmission for purposes of this paragraph and will not be given force or effect absent compliance with the provisions of this paragraph.
>
> (d)(2) Exceptions. Notwithstanding the provisions of paragraph (d)(1) of this section, a refiner may resubmit or refile reports until June 1, 1979 for months of measurement beginning with September 1973; where expressly authorized by DOE regulations or order; or where DOE grants written permission to resubmit or refile for good cause shown. (emphasis supplied).

The right to file resubmitted reports is and has been based on the recognition that reports are sometimes based on estimated data. In addition, the resubmissions allow for adjustments based on agency interpretations and clarifications. However, the section imposes time limitations on such refilings "in order to more effectively stabilize cost allocation data for the purpose of finalizing compliance actions or audits, and to prevent possible circumvention of the regulations by inappropriate use of the resubmission procedure." Preamble to 10 C.F.R. § 212.126(d), reprinted in 5 Energy Mgt. (CCH) ¶ 40,413. The section imposes a time limitation on refiling of 1 year or, in the case of older forms, to June 1, 1979.

However, while the language of the regulation itself does not limit the kinds of adjustments that are routinely permitted

in timely resubmissions, the Preamble to the regulation makes it clear that the prohibition against retroactive reallocation of costs absent prior permission from the agency continues:

> As indicated above any resubmissions or refilings pursuant to the initial grace period exception and 1 year exception are subject to standard audit guidelines regarding verification of allowable costs. With respect to the type of revisions which may be made, a refiner will not be permitted to use the refiling procedures to circumvent DOE regulations or frustrate current DOE audits by, for example, reflecting arbitrary reallocation of costs in a prior period in order to avoid the consequences of an enforcement action. The allocation of costs to particular products in a particular month reflects the election of certain options by refiners provided for by the price rules. For example, certain costs attributable to general refinery products (GRP) may be allocated to sales of gasoline or to sales of a number of products within the GRP category. The election of such allocation options, in turn, effect calculation of maximum allowable prices in subsequent months. Accordingly, in the absence of a final order or written permission from the Department, such reallocation of costs may not be reflected in the refilings of DOE cost allocation forms permitted during the

> one year period for refiling, or in the case of older forms, by June 1, 1979. (emphasis supplied).

Preamble to 10 C.F.R. § 212.126(d), 44 Fed. Reg. 14,534 (March 13, 1979), reprinted in 5 Energy Mgt. (CCH) ¶40,413.

In view of the Tenneco holding and the reasoning contained therein, and the confirmation of that reasoning contained in the Preamble to 10 C.F.R. § 212.126(d), we must conclude that the challenged retroactive reallocation of costs was not permissible under the regulations.

IV. Computation of Damages

After disallowing the challenged $70.3 million in retroactive reallocation of costs for the pertinent period, (Plaintiff's Trial Exhibit 1001, Chart B-1, column 4), Eastern computes ARCO's overrecovery against Eastern to be $946,108. (Rushing, Tr. at 271; Plaintiff's Post-

Trial Memorandum at 49). ARCO's calculation of damages is $179,147. (Defendant's Exhibit 208). The difference arises not from the underlying data relied upon but from the different methods employed by both parties to compute damages based on that data.

In this court's Memorandum of Decision dated January 12, 1982 we rejected Eastern's method of computation, finding that its damage figure was grossly overstated. For the reasons described therein and below we adhere to our original opinion.

Both Eastern's and ARCO's computations are based on figures relating to "other covered products" contained in ARCO's latest FEO-96 forms filed in 1979. In Plaintiff's Trial Exhibit 1001, Chart B-5 [APP. III at 47], Eastern recalculated ARCO's figures after disallowing the $70.3 million in challenged retroactive reallo-

cations./16 Examination of the FEO-96 form reveals that once an overrecovery for a particular month has been calculated (column 6) that overrecovery is subtracted from the increased product costs incurred in the month of measurement (column 3), in order to obtain the cost available for recovery in the next month (column 7). In this way, each overrecovery is used to reduce the amount available for recovery in the succeeding month. Therefore, each month's overrecovery figure represents the cumulative overrecovery of the preceding period; the last overrecovery figure of $26.9 million appearing on the FEO-96 for the pertinent period, which is the overrecovery figure for October 1974, the last month of Eastern's purchases, is the cumulative overrecovery for the entire period. Eastern ignored the cumulative nature of each month's overrecovery figure. In com-

puting its damages, Eastern summed all the overrecovery figures for every month pertinent to this suit, arrived at a figure of $143 million and assigned a proportionate share to Eastern based on its purchases. Clearly, in employing this method, Eastern grossly overstated damages.

ARCO employed an accurate method to compute damages. Since the monthly overrecovery figures in Eastern's Chart B-1 (footnote 16) are cumulative, the differences between each month represent the incremental overrecovery for each month. In Defendant's Exhibit 209, Mr. Lavin of ARCO computed for each month Eastern's proportionate share of other covered products sold and multiplied that percentage by the incremental overrecovery for that month. (Lavin, Tr. at 1788-89). Adding the monthly overrecoveries for the pertinent

period, the total damages to Eastern are $179,160./17

Accordingly, the damages to Eastern based on ARCO's overrecovery of increased costs is $179,160./18

V. Multiple Damages and Attorney's Fees

Eastern claims that multiple damages and attorney's fees should be awarded against defendant for its willful overcharges. Section 210(b) of the Economic Stabilization Act, 12 U.S.C. § 1904 Note, provides:

> In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the cout [sic] may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus, whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoidance of such error, the liability of the defendant shall be limited to the amount of the overcharge. (emphasis added).

Clearly multiple damages and the award of attorney's fees can only be imposed in relation to determined "overcharges." Each of Eastern's overcharge claims in this case was based on separate and distinct facts and law. Accordingly, the question of attorney's fees and multiple damages must be examined separately in relation to each claim. Because, as this court found, an overcharge occurred only with respect to the overrecovery of increased costs after disallowance of the retroactive reallocation of costs, (Sections III and IV, supra), the question of the propriety of

imposing multiple damages and attorney's fees is limited to that issue. In addition, the computation of multiple damages would be based on the damage figure of $179,160 which relates to that claim and the computation of attorney's fees would be based on legal preparation relating only to that claim.

Both the statute and legislative history indicates that multiple damages and attorney's fees will be imposed only for a willful overcharge. The Conference Committee noted in its Report that the "House bill authorized consumers to bring suits to recover three times the amount of the transaction from anyone willfully violating the price control regulations." Conf. Rep. No. 92-753, 92d Cong., 1st Sess. 4 (1971), reprinted in [1971] U.S. Code Cong. & Admin. News 2307, 2310. The Senate's bill, ultimately accepted by the Conference

Committee, authorized suits for damages up to three times the overcharge, as opposed to the transaction, but also contained a willfulness requirement for imposition of such multiple damages. Id.

The Conferees stressed that the term willful was to "have the same meaning as in the case of criminal willfulness." Id. In Ashland Oil Co. v. Union Oil Co., 567 F.2d 984, 989-90 (1977), cert. denied, 435 U.S. 994 (1978), The Emergency Court of Appeals, citing the legislative history, stated:

> While there is public policy clearly evident to provide both remedy for and deterrence against the violation of pricing regulations, the Congress made it equally clear that the recovery of treble damages in the nature of a penalty for violating those regulations would involve more stringent proof of additional elements than that warranting the award of merely compensatory relief.

As the statute indicates once an overcharge is established the burden of proof lies with the defendant to establish that

the overcharge was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error." We find that the evidence clearly supports ARCO's contention that the determined overcharge was not intentional within the meaning of the legislation.

Viewing ARCO's compliance efforts generally, it is clear that ARCO formulated and implemented a costly system intended to aid in compliance. Prior to promulgation of the Phase IV regulations in August 1973 ARCO officials reviewed the Cost of Living Council's proposed regulations so as to familiarize themselves and other affected employees with the requirements of the regulations. (Morse, Tr. at 1326-28; Foster, Tr. at 1000-01). Upon promulgation of the regulations field personnel were advised that prices could thereafter not be

increased without approval of ARCO's Price Control Policy Committee. Price increase request forms (PI-1 forms) were used for this purpose. (Foster, Tr. at 1009-10, 1018-24). As discussed previously, (Section II, supra), requests and recommendations for price increases were in response to what were considered actual cost increases indicated by the Gulf Coast Low posting. PI-1 forms were reviewed by various price control offices to ensure that ARCO had sufficient dollars in the appropriate cost bank to cover the increase (Foster, Tr. at 1021, 1088-89, 1157-58, 1307), and to ensure that the proposed increments were the same for other non-contract customers. (Foster, Tr. at 1092; Morse, Tr. at 1399-1400). Final approval was secured from the Price Control Policy Group and finally by the company's chief financial officer, the Corporate Control-

ler. (Foster, Tr. at 1035-37, 1046-47, 1075, 1158, 1239-40). A cost monitoring system was also implemented to record increases in the cost of crude. (Foster, Tr. at 1012-13, 1030, 1052-54). Finally, a recovery monitoring system was implemented to keep track of its bank balances. (Foster, Tr. at 1061-62, 1068-72). The wide area base price system initially utilized to record recoveries was not an exact system but was reasonable until the company could compute recoveries on an individual basis, with the aid of a computer system subsequently designed. (Foster, Tr. at 1072-73, 1261, 1295; Morse, Tr. at 1332, 1351-52).

ARCO's compliance efforts were a major task, utilizing substantial staff resources. Mr. Foster headed a network of ARCO personnel who monitored costs and recoveries. The Price Committee, chaired

by the Company's Manager of Government Controls Coordination and comprised of middle-level managers from a variety of Products Division organizations was created to ensure complaince and was assisted by legal counsel, and the Government Controls Policy Group, comprised of Executive Vice Presidents, was created to supervise the Price Committee and coordinate government controls policy. (Foster, Tr. at 1013, 1021, 1028-30; Defendant's Exhibits 28, 36). In 1974 the Price Committee developed an estimate of the costs of compliance which indicated that in 1974 ARCO spent more than $18 million to the task. (Foster, Tr. at 1087-88).

In attempting to minimize ARCO's substantial compliance efforts, Eastern oversimplifies the major task involved in compliance. There is no doubt that the regulations were sometimes vague and difficult

to comprehend. Guidance provided by the agency in its rulings was often delayed and contradictory. Regulations were amended often. For a company like ARCO with about 115,000 customers and 1300 products sold at hundreds of locations, (Morse, Tr. at 1352; Foster, Tr. at 1070-72), compliance with the price and allocation regulations was difficult and immediate compliance was an impossibility. Under these circumstances, ARCO's compliance systems evidence a clear intent on the part of the Company to conform its operation to the regulatory requirements.

Turning to the specific overcharge at issue, we conclude that there was no intent on the part of ARCO to effect the underlying overrecoveries. As we discussed in Section III, supra, the overrecoveries in the other covered products category resulted after ARCO made adjustments to cost and

recovery figures which for the most part were necessitated by Rulings 1974-17, 1974-18 and 1974-27. The testimony of Mr. Morse and Mr. Foster made clear that the interpretations given to the various regulations by those rulings were not the customary meaning attributed to the regulations by the industry. In fact, at least with regard to Rulings 1974-17 and 18, ARCO tried to convince the administrative agency that the ruling was in fact a new regulation and, therefore, should not be given retroactive effect. The testimony of Mr. Morse also indicated that Ruling 1974-27 also represented a departure from an interpretation ascribed to a similar regulation under the Phase III price regulations. Indeed, parts of Ruling 1974-27 were later declared erroneous.

Clearly, the overrecoveries resulting from these and other adjustments, (Sec-

tion III, supra) were not intentional. In fact, the recalculation of costs and recoveries based on the retroactive rulings emphasizes ARCO's continuing efforts to remain in compliance with the regulations.

Accordingly, multiple damages and attorney's fees will not be awarded.[19]

CONCLUSION

ARCO has overcharged Eastern in the amount of $179,160. Eastern's request for an award of multiple damages and attorney's fees is denied.

SO ORDERED.

The court finds pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay. The Clerk of the Court is directed to enter judgment against defendant and in favor of plaintiff in the amount of $179,160.

The claim based on violation of the antitrust laws is severed.

/s/ Jacob Mishler
U. S. D. J.

FOOTNOTES

/1 The complaint also contained a claim based on violation of the antitrust laws. This claim was severed and stayed by order dated July 8, 1975.

/2 Section 4(b)(2)(A) of the EPAA, pursuant to which the Mandatory Price and Allocation regulations were issued mandated that the regulations "provide for dollar-for-dollar pass-through of net increases in the cost of crude oil, residual fuel oil and refined petroleum products. . . ."

/3 The Mandatory Price and Allocation regulations which were issued in January 1974 were substantially an adoption of the Phase IV regulations. Since the Mandatory Price and Allocation regulations were in effect for the remainder of the mandatory period in issue in this suit, all references to regulations shall be to that version unless otherwise indicated.

/4 Accordingly, we adhere to our opinion expressed in the Memorandum of Decision dated January 12, 1982, at 16-18, that it would have been wholly contrary to the regulations for ARCO to have assigned Eastern to its own class of purchaser and to have utilized the May 15, 1973 price, the 11.55 per gallon price associated with its last transaction with ARCO which occurred on January 31, 1973.

We also reject Eastern's assertion that ARCO actually made a determination that Eastern's May 15, 1973 price was 11.55 cents per gallon. Eastern relies on a single statement in the 1975 deposition testimony of Mr. William Shellem, who has been employed by

ARCO since May 1974 as Manager of Government Compliance in Government Reports and Analysis Price Control. At the deposition, Shellem stated that he did not take part in the process of establishing May 1973 base prices, either before or after he joined the company. This fact was confirmed at trial by the testimony of Mr. Foster, for whom Mr. Shellem worked. (Foster Tr. at 1092-93). However, when he was shown a computer printout dated April 18, 1975 which listed a price for Eastern of 11.55 cents, Mr. Shellem answered affirmatively when asked whether the 11.55 cents was the base price for Eastern.

At trial ARCO presented several witnesses who explained the meaning of the prices listed on the computer printout. The computer program was designed by Mr. Roger Husband, Systems Development Manager for ARCO, to provide the initial data for the development of base prices by identifying the transaction on or closest preceding May 15, 1973 for each ARCO customer. The 11.55 cent price represented a computer record of Eastern's last transaction with ARCO. The information was used in computing recoveries and did not reflect the price actually charged Eastern nor any judgment as to base price. The effect of the erroneous figure in computing recoveries was an overstatement of recoveries for jet fuel. (Deft's. Memo at 27-32; Foster, Tr. at 1041-42, 1068-72, 1080-82, 1086, 1259-60, 1262, 1306; Morse, Tr. at 1331-32, 1350-51, 1353-56, 1357-59, 1368, 1397-98, 1425, 1482-32; Husband, Tr. at 1540-43; Deft's Exh. 59, 60, 61).

/5 The letter to Mr. Imoor was written to explain that since November, 1973 Eastern

had been charged 1.798 cents per gallon in excess of the 12.89 cent per gallon price and that ARCO had credited Eastern's account accordingly. Mr. Morse testified that he instructed appropriate refunds be made to Eastern.

At trial, Mr. Morse explained that ARCO failed to implement the 12.89 cent price he provided because marketing personnel initially performed a "Houston netback" calculation to derive Eastern's price from that of U.S. Steel. (Morse, Tr. at p.1365-66; Plaintiff's Trial Exhibits ("PTE") 10, 12, and 212, internal memos at ARCO which show U.S. Steel's price and the netback calculations performed to derive Eastern's price and Defendant's Exhibit ("D.Exh.") 87, a letter from ARCO to U.S. Steel stating the October 9, 1973 price which corresponds to the prices which Eastern would have been charged before the netback calculations). Mr. Morse explained the netback calculations as follows:

> In our system of determining acceptable values of product prices in the east, we had a system whereby we used the Houston refinery center as the basing hub. So, in terms of figuring out whether you are getting an adequate reasonable price for a product in some places, like Chicago or Pittsburgh, we would do a Houston netback by saying, if we deducted the transportation element of cost from the price in Pittsburgh to essentially pretend that it was being sold in Houston, what would its value be. If you took that value and add on to it the transportation to get to Chicago, then you would have an equivalent value of product as you did at

Pittsburgh, and that is called netback calculations.

Following Mr. Morse's letter to Mr. Imoor of Eastern, appropriate refunds were made to Eastern, as per Mr. Morse's instructions, with respect to purchases at O'Hare. However, ARCO has conceded that through apparent clerical error it failed to make a refund in 1974 with respect to purchases at Love Field. In March 1982, ARCO refunded $13,398 for those purchases. Appendix III to Defendant's Brief, at 50.

/6 Throughout this litigation Eastern contended, among other things, that ARCO's east/west division was irrelevant and therefore that Eastern should have been placed in a class of purchaser consisting of ARCO's major commercial airline customers west of the Rockies. In its post-trial brief, Eastern has abandoned this contention in favor of its argument that Eastern should have been placed in its own class of purchaser. Nevertheless, ARCO presented evidence concerning the May 15, 1973 prices of its three major commercial airline customers in the western region. (Joint Pretrial Stipulation Par. 26), which showed that Eastern was not prejudiced and in fact benefitted from being assigned to U.S. Steel's class of purchaser rather than a nationwide class consisting of all domestic carriers, see Trans World Airlines, Inc. v. Federal Energy Office, 380 F.Supp. 560, 564 (D.D.C. 1974), aff'd sub nom., Air Transport Ass'n of America v. F.E.O., 520 F.2d 1339 (Em. App. 1975) or rather than being assigned to a class consisting of a particular airline customer in the west whose purchasing and delivery characteristics resembled those of Eastern. See Defendant's Post-Trial Brief at 24-26.

/7 The pipelines and storage facilities that had been used to supply Eastern at O'Hare and Love Field had been removed or converted to other uses and their capability to assure the integrity of jet fuel quality destroyed. Because ARCO was no longer engaged in selling jet fuel to any customer at Love Field or O'Hare Field in the fall of 1973 when it was required to supply Eastern, ARCO entered into "exchange agreements" with other refiners to supply Eastern at those locations during the relevant period.

/8 We reject Eastern's assertion, made for the first time in its post-trial memorandum, that Eastern should have been assigned to a class of purchaser consisting of the Philadelphia Electric Company, a public utility. With this argument Eastern concedes that ARCO's historical east/west division justifies the creation of separate classes. It asserts that Eastern's purchasing characteristics more closely resemble those of Philadelphia Electric than U.S. Steel, reasoning as follows:

> Philadelphia Electric Co. was much more similar to Eastern in every relevant way than was U.S. Steel. Philadelphia Electic was annually a multi-million dollar purchaser, as was Eastern. It took delivery close to a refinery, as did Eastern.
>
> It was a contract customer, as Eastern had been. And the last transaction between Philadelphia Electric and Atlantic Richfield was at 11.54 cents [sic]

First, as ARCO asserts, "a litigant cannot be permitted to introduce a new factually-based theory after trial, thereby depriving its

opponent of the right to respond. To do so would make a mockery of the pretrial issue definition process used here and would ignore the fact that Eastern has the burden of proving any facts relevant to Philadelphia Electric's price." In any event, ARCO (Reply Brief at 13-15) outlined a number of facts which are already in the record, or which it would have introduced had it been afforded the opportunity, which would have made it apparent that the regulatory scheme did not require ARCO to pair Eastern with Philadelphia Electric:

> [A]part from not requiring aviation-quality jet fuel, Philadelphia Electric purchased at 11.54 cents per gallon in barge-load lots averaging 1 million gallons, while Eastern's average transaction volume was a fraction of that amount.
>
> . . . Philadelphia Electric did not use jet fuel for aviation purposes; rather jet fuel was used in the generation of electric power. This distinction had important practical effects on the way in which the fuel was produced and delivered. For example, in supplying jet fuel for use by a commercial airline [s]pecial equipment is required to assure the integrity of jet fuel quality. . . .' (DeWolfe, Tr. at 1515).
>
> Moreover, different financial arrangements are possible in dealing with a public utility. . . . In this case, Atlantic Richfield could properly have considered not only the better credit standing of the public utility [J.E. Meintzer & Sons, 4 F.E.A. ¶ 80,546 (1976)], but also the fact that Phila-

delphia Electric's one-year contract guaranteed that a minimum quantity would be purchased from Atlantic Richfield. Eastern had no minimum purchase requirement.

Finally, . . . just as Atlantic Richfield distinguished between its eastern and western customers as a matter of marketing practice, it followed a distinction between those customers that used its fuel for aviation purposes and those that used it for other types of ultimate consumption. . . . Its public utility accounts were handled by different employees than those handling its aviation accounts.

/9 As part of its equal application claim Eastern also asserts that ARCO failed to compute "maximum" price increases based on increased costs in accordance with the regulations. The cited regulations do not provide a specific method for arriving at a "maximum" price increase.

Because of the provision for reallocating costs from other covered products to compute a price increase for one particular product, Eastern claims that a determination of a maximum price increase required the refiner to first calculate the amount of increased costs for all other covered products and then "allocate [to the particular product] a pool of dollars from its increased product costs available for recovery through the sale of other covered products." Plaintiff's post-trial memo at 60. We disagree.

ARCO witnesses testified at length about its method of computing price increases for its products. Requests for price increases for a

particular product were initiated by marketing personnel and were based on, and apparently commensurate with, increases (or decreases) in Platt's Gulf Coast Low Posting. (Foster Tr. at 1158). The price increase requests were on forms called "PI-1's". As explained by Mr. Foster, (Tr. at 1157-58):

> When PI-1's came in from the marketing people, they made their way through marketing management and came to my group where we asserted [sic] that there was sufficient increased costs available for recovery in time subsequent to the date the price increases would be effective.
>
> We took these PI-1's to the price committee for review and approval and ultimately took them to the policy group for review and approval before price increases were implemented.

We agree with Mr. Morse, (Tr. at 1399-1400), that the system effectuated the equal application rule since

> all of the pricing authorities had been centralized and the decision-making mechanism was one of approving a price adjustment for a product. So, when that decision was made and approved and transmitted to the people responsible for customers and billing, et cetera, it would go in the form of saying the price of jet fuel is increased two cents a gallon and since they had no discretion or authority, all they did was apply that price with the exception if there was a contract concerning them to do something less.

They knew they couldn't bill more than the contract permitted.

There is no requirement stated in the regulations that increased costs be reallocated from "other covered products." A system such as ARCO's in which prices are raised in response to an increase in the cost of fuel oil satisfies the only stated requirement that prices be increased only to account for an increase in the cost of the product, or of another "other covered product." In any event, Eastern has not asserted, nor has it submitted any proof that any specific increase in the price of jet fuel was not supported by an increase in the cost of jet fuel or of another "other covered product" which might have resulted in an overcharge to Eastern for which it could recover under § 210 of the Stabilization Act. Longview Refining Co. v. Shore, 554 F.2d 1006, 1022 (Em. App. 1977).

/10 ARCO contends that Eastern's equal application claim is in effect a claim of "unequal treatment" and is not cognizable as an "overcharge" under § 210(c) of the Economic Stabilization Act. This position was advanced by Mobil Oil Corporation in challenging Eastern's equal application claim in a case which was a companion to this case. The district court found in Mobil's favor and dismissed Eastern's claim on this issue, Eastern Airlines, Inc. v. Mobil Oil Corp., No. 74-765-Civ (S.D.Fla. May 1, 1981). That decision, however, was reversed on appeal wherein it was held that the plaintiff should have been permitted to amend its complaint to set forth a claim under the more general provisions of § 210(a) since the factual basis for a price discrimination claim was alleged early in the case under the Robinson-

Patman Act and therefore the introduction of an alternative theory of recovery based on those facts was not prejudicial to defendant.

Because of our ultimate disposition below that Eastern has not proved its claim of unequal application of price increments we need not decide whether Eastern's claim is cognizable under § 210(c) as alleged.

/11 Recoveries were computed by multiplying the volumes purchased by that customer for the stated period by the difference between that customer's weighted average selling price for the stated period and its May 15, 1973 price, as used by Atlantic Richfield. (J.P.S.,Appendix F).

SUMMARY OF TRANSACTIONS WITH NON-CONTRACT JET "A" CUSTOMERS*

PERIOD	EASTERN (1) GALLONS***	EASTERN (2) RECOVERIES ($)***	NON-EASTERN (3) GALLONS***	NON-EASTERN (4) RECOVERIES ($)***
November, 1973	2,086,385	247,486	2,879,848	514,286
December, 1973	2,392,474	458,375	20,500	3,508
January, 1974	2,115,275	440,796	27,800	6,989
February, 1974	1,551,690	389,474	1,068,818	287,718
March, 1974	2,104,032	442,899	1,415,370	324,527
April, 1974	1,943,802	306,732	1,507,026	277,725
May, 1974	1,871,478	290,641	178,371	26,753
June, 1974	1,822,800	283,081	479,529	88,875
July, 1974	1,786,680	286,226	1,439,762	286,196
August, 1974	1,876,392	300,786	304,254	55,488
September, 1974	1,762,572	282,540	223,379	42,227
October, 1974**	1,141,098	184,630	619,053	110,653
TOTAL	22,455,178	3,913,666	10,163,710	2,024,945

AVERAGE RECOVERIES PER GALLON NOVEMBER 1973 TO OCTOBER 1974** ($)

EASTERN [Total Column (2) ÷ Total Column (1)]	.17429
NON-EASTERN [Total Column (4) ÷ Total Column (3)]	.19923

* Derived from Monthly Analyses, see EAA11210 through EAA11221.

** Ending October 23.

*** See Joint Pretrial Stipulation Appendix F, except for totals.

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EAA00001205

/13 Although this court relies on the "overall" method for analyzing the equal application claim to conclude that Eastern was not injured, it is noteworthy that the damage figure would be minimal even analyzing the equal application issued under a "monthly method" which, unlike the overall method, does not afford ARCO credit for the amounts by which it charged ARCO less than the monthly maximum price to offset the amounts by which Eastern was charged in excess of the monthly maximum allowable price. Applying such a monthly method to the same stipulated non-contract recovery figures utilized in analyzing the "overall method" the total damages to Eastern would be $6,517 (Defendant's Exhibits 200 and 201; Lavin, Tr. at 1763-69).

Defendant's Exhibits 200 and 201, also prepared by Mr. Lavin, analyze the equal application claim on a monthly basis. Again, the non-contract recoveries and volumes purchased are taken from the Joint Pretrial Stipulation (J.P.S. ¶ 45, and Appendix F). In Exhibit 200, Mr. Lavin arrived at a "maximum monthly price increase" by taking the total non-contract recoveries (including those of Eastern) and dividing those recoveries by the volumes associated with them. In Defendant's Exhibit 201, Mr. Lavin adds the "maximum monthly price increase" to Eastern's 12.89 cent base price to determine Eastern's maximum allowable price. This figure is then compared to the price Eastern was actually charged each month. The actual monthly price is included in the Joint Pretrial Stipulation, ¶ 31.

The comparison reveals that at O'Hare in eleven of the twelve months at issue, Eastern was charged less than the allowable price.

In the single month (May 1974) where its O'Hare price exceeded the allowable price the excess was five one-hundredths of a cent per gallon. Without offsetting the minimal May excess by ARCO's underpricing of Eastern in the eleven other months, the total dollar impact of the excess charge is $936.

At Love Field, Eastern was charged less than the maximum price in one of the three months it was serviced and in excess in the other two months. Again, ignoring any credit to ARCO for the months in which Eastern was charged below the maximum allowable price but recognizing the recent refund of $13,398 made by ARCO to Eastern for purchases at Love Field, the damages at Love, computed on a monthly basis, would amount to $5,581. (PTE 37; Lavin, Tr. at 1768-69; computation charts in App. III, at 52). As the basis for its equal application claim Eastern computed its damages on a basis similar to the monthly approach demonstrated by ARCO (See Chart D-13, PTE 1001 at 127), but arrived at a damage figure of over $1 million as compared to ARCO"s $6,517 figures. Even had this court found the monthly approach more appropriate than the overall method relied on, we would have rejected Eastern's damage calculations in favor of ARCO's.

Unlike ARCO, Eastern has not relied on accurate or reliable data as the basis for its calculations. Instead of using the actual non-contract monthly recoveries contained in Paragraph 45 and Appendices D through G of the Joint Pretrial Stipulation, Eastern derived its own non-contract recovery figure from various sources. Eastern first used figures called ARCO's "reported monthly recoveries" on the sale of jet fuel which were listed in Paragraph 54 of the Joint Pretrial

Stipulation. These figures, although included in the stipulation have no significance. They are not described as the actual recovery figures for jet fuel. Nor were these figures ever reported in an FEO-96 Form as alleged by Eastern (Plaintiff's post-trial memorandum at 56) since jet fuel recoveries were never reported to the FEA. In fact, the data in Paragraph 54 were generated as internal backup to ARCO's 1975 unfiled and incompleted restatement of the FEO-96. Eastern itself noted in its memo that these figures were taken from Plaintiff's Trial Exhibits 150 through 163 which were produced in 1975 as exhibits to the deposition of William Shellem (Plaintiff's Post-trial Memorandum at 62 n.41). In addition, as ARCO notes in its Reply Memo at 20, data relating to the 1975 internal restatement was rendered obsolete by ARCO's 1979 formal refiling of FEO-96s. In fact, the 1979 refiled FEO-96 reports $1.8 million more in recoveries for other covered products than the 1975 internal restatement. Even Mr. Rushing of Eastern admitted that the "reported recoveries" for jet fuel are not the same as "actual recoveries" and based on what Mr. Rushing referred to as "stipulated data" he computed an "actual" recovery figure on all sales of jet fuel. (Rushing, Tr. at 539-40; Charts D-14 and D-15 PTE 1001 at 128 and 129). Eastern determined that the "reported" recoveries were $1.6 million lower than "actual" recoveries. The "actual" recoveries generated by Eastern coincide with those relied on by ARCO and included in the Joint Pretrial Stipulation, Par. 45, Appendices F and G, except for minor discrepancies which the parties recognized, but which each agreed to ignore, in the other's calculations. Eastern's actual recovery figures are contained in Appendices J and K

of the Joint Pretrial Stipulation. Finally, as Mr. Rushing admitted, the reported recoveries for various months contained a number of "anomolies," for instance, a negative recovery figure for November, 1973 which was "impossible." (Rushing, Tr. at 365-66, 539-40). Reliance on the "reported monthly recoveries" figure was clearly erroneous.

From the "reported monthly recoveries" Eastern subtracted monthly "contract customer recoveries" from an unstipulated source--ARCO computer printouts generated in 1975 (PTE 284), to arrive at its non-contract recovery figure, despite the fact that non-contract recovery figures were stipulated, as discussed above. Clearly, Eastern's damage calculations based on reported recoveries could not be relied upon.

/14 Eastern does not contend that ARCO's reallocation of increased costs from special products to other covered products would not have been permitted under the regulations at the time pricing and allocation decisions were being made by ARCO. Therefore, Eastern's claim only concerns the propriety of retroactive reallocation.

/15 We find insignificant the fact that the Tenneco holding dealt with a retroactive reallocation to the gasoline bank from general refinery products as opposed to an allocation to "other covered products" from "special products." What is important is that in Tenneco the right to have made the reallocation during the period was recognized. Contra, Eastern Airlines, Inc. v. Mobil Oil Corp., No. 74-765-CIV at 20 (S.D. Fla. May 1, 1981), rev'd on other grounds and remanded, 677 F.2d 879 (Em. App. 1982).

CHART B-1

EASTERN AIR LINES, INC. vs. ATLANTIC RICHFIELD COMPANY--OVERRECOVERIES OF INCREASED PRODUCT COSTS AFTER ADJUSTMENTS FOR RETROACTIVE REALLOCATIONS CALCULATED PURSUANT TO FED-94 INSTRUCTIONS

1. Month of Measurement	2. Increased Product Costs Available for Recovery--Month of Measurement	3. Increased Product Costs Incurred--Month of Measurement	4. Cost Allocations--[Retroactive Reallocations]	5. Recovery--Month of Measurement	6. Under (Over) Recovery	7. Costs Available For Recovery After Month of Measurement
AUG 73	-0-	7,100,000	-0-	-0-	-0-	7,100,000
SEP 73	7,100,000	8,000,000	-0-	3,800,000	3,300,000	11,300,000
OCT 73	11,300,000	14,000,000	[12,000,000]	8,000,000	5,300,000	17,300,000
NOV 73	17,300,000	20,500,000	[6,000,000]	13,900,000	3,400,000	23,900,000
DEC 73	23,900,000	26,500,000	2,700,000	23,300,000	[4,400,000]	24,800,000**
			[2,300,000]			
JAN 74	24,900,000	30,600,000	[5,000,000]	30,800,000	[6,000,000]	24,600,000
FEB 74	24,600,000	46,900,000	[5,000,000]	27,000,000	[2,400,000]	44,500,000
MAR 74	44,500,000	38,800,000	-0-	48,800,000	[4,300,000]	26,500,000
APR 74	26,500,000	33,700,000	[5,000,000]	33,600,000	[7,100,000]	26,600,000
MAY 74	26,600,000	38,100,000	[5,000,000]	38,600,000	[12,000,000]	18,100,000
JUN 74	18,100,000	31,600,000	[5,000,000]	32,800,000	[14,700,000]	16,900,000
JUL 74	16,900,000	35,800,000	-0-	40,900,000	[23,900,000]	11,900,000
AUG 74	11,900,000	37,700,000	[10,000,000]	33,600,000	[21,500,000]	16,300,000
SEP 74	16,300,000	36,700,000	[5,000,000]	36,800,000	[20,600,000]	16,100,000
OCT 74	16,100,000	33,600,000	[10,000,000]	43,000,000	[26,900,000]	6,700,000

Column across next page.

NOTE: Complete FED-94's showing the above adjustments are B-5 hereto.

/16 (Plaintiff's Exhibit 1001, Chart B-1):

/17 In our Memorandum of Decision dated January 12, 1982, we discussed the various methods of computing damages. In arriving at an approximation of damages the court employed an overall method as opposed to the monthly method employed by ARCO. At page 30, we stated:

> The overrecoveries by ARCO for the entire relevant period for "other covered products" amount to 26,900,000. . . . Eastern's total purchases of jet fuel amount to 20,366,438 gallons. The total sales by ARCO of "other covered products" amount to 3,178,000,000 gallons. In other words, Eastern's jet fuel purchases amounted to .64085 percent (.0064) of the total sales of "other covered products." Sixty-four percent (.0064) of the total overrecovery of $26,900,000 produces an overrecovery allocable to Eastern's purchases of jet fuel of $172,388.

Since ARCO's monthly method produces a higher damage figure, Eastern benefits from that computation as opposed to the overall method. In any event, we believe the monthly method, which accounts for the varying monthly proportions of Eastern's jet fuel purchases to all other covered products, more accurately reflects damages since under the regulations outlined, supra, overrecoveries were to be refunded or deducted from the price in the subsequent month and not continually carried forward to succeeding months.

/18 Eastern originally also asserted a claim that an adjustment must be made to the May 1979 FEO-96 figures to correct for errors in the computation of increased costs of pur-

chased other covered products. If Eastern's claim were [sic] valid, the result would be to further reduce the costs in the other covered products bank. Based on evidence introduced at trial over Eastern's objection, Eastern has deleted its claim although it has preserved its exception to the overruling of its objection. Eastern apparently concedes that the evidence produced by ARCO on this issue disproves Eastern's claim. Therefore, we need not address this issue. We note, however, that we agree that ARCO disproved Eastern's claim that the 1979 FEO-96 reports reflect incorrect figures of the cost of other covered products. ARCO includes a full discussion of this issue in its post-trial memorandum at 89-98, which this court adopts as its findings.

/19 Eastern's request for prejudgment interest must also be denied. Section 210 of the ESA authorizes suits by private parties for damages for overcharges. If an overcharge is found to be intentional, multiple damages and attorney's fees may be awarded in favor of a private plaintiff. However, the statute also makes clear that if an overcharge is found to have been unintentional, damages shall be "limited to the amount of the overcharge." In light of the specific limitation on the remedy available we cannot infer that Congress intended to make a further remedy available. The DOE's ability to award prejudgment interest does not suggest that prejudgment interest is available to a private plaintiff. The administrative proceedings brought by the DOE are authorized by the Department of Energy Organization Act, 42 U.S.C. § 7193 (Supp. III 1979) and by §§ 203 and 204 of the ESA which authorize the President or his delegate "to issue such orders and regulations as he deems appropriate."

Even if prejudgment interest were permissible under the statute authorizing the private action, this is not an appropriate case to award prejudgment interest. Prejudgment interest is available only where the amounts due are certain or reasonably capable of being ascertained, and is not available where "the sums claimed to be due were uncertain." Belcher v. Birmingham National Bank, 488 F.2d 474, 478 (5th Cir. 1973). In the case before us, the sums claimed to be due have remained uncertain throughout the protracted litigation and were not reasonably capable of being ascertained.

STATUTORY ADDENDUM

PERTINENT STATUTES

Section 210 of the Economic Stabilization Act, 12 U.S.C. § 1904 note, provides as follows:

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any

person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sum is greater:

> "(1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> "(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to

the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

Pub.L.No. 93-159; 87 Stat. 627

[S.1570]

NOTE: This is the original version of the EPAA. The EPAA of 1973 was subsequently amended by Pub.L.No. 93-511, Pub.L.No. 94-99, Pub.L.No. 94-163, and Pub.L.No. 94385.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Emergency Petroleum Allocation Act of 1973".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that--

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and

businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exer-

cised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

DEFINITIONS

Sec. 3. For purposes of this Act:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to--

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or con-

tract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner),

but who is not affiliated with, controlled by, or under common control with any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B)), and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who (A) is not a refiner, (B)

is not a person who controls, is controlled by, is under common control with, or is affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him

through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

MANDATORY ALLOCATION

Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for--

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum prod-

ucts at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interfer-

ence with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for--

(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of mark-up, margin, and posted price for all marketers or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

(3) The President in promulgating the regulation under subsection

(a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

(c)(1) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall be so structured

as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each non-branded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide--

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount pro-

duced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in--

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products, of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by

order require an equitable adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary--

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d), of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) The regulation under subsection (a) shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for

use by ultimate users within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b).

(e)(1) The provisions of the regulation under subsection (a) shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b)(1)(E) or the other objectives of subsection (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the Presi-

dent's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence.

(2) (A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regu-

lations implementing the provisions of this paragraph.

(f)(1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If--

(A) an order or regulation under section 203(a)(3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment of this Act, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a)(3) to the mandatory allocation program required under this Act,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress

setting forth his reasons for the action under this paragraph.

(g)(1) The regulation promulgated and made effective under subsection (a) shall remain in effect until midnight February 28, 1975, except that (A) the President or his delegate may amend such regulation so long as such regulation, as amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petroleum product from such regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regulation and to issue any order under this section, and to enforce under section 5 such regulation and any such order expires at midnight February 28, 1975, but such expiration shall not affect any action or pending pro-

ceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975.

(2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress.

An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.

ADMINISTRATION AND ENFORCEMENT

Sec. 5. (a)(1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation

promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

(b) The President may delegate all or any

portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

EFFECT ON OTHER LAWS AND ACTIONS TAKEN THEREUNDER

Sec. 6. (a) All actions duly taken pursuant to clause (3) of the first sentence of section 203(a) of the Economic Stabilization Act of 1970 in effect immediately prior to the effective date of the regulation promulgated under section 4(a) of this Act, shall continue in effect until modified pursuant to this Act.

(b) The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such

regulation or any such order.

(c)(1) Except as specifically provided in this subsection, no provisions of this Act shall be deemed to convey to any person subject to this Act immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) As used in this subsection, the term "antitrust laws" includes--

(A) the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.);

(B) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes, approved October 15, 1914 (15 U.S.C. 12 et seq.);

(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

(D) sections 73 and 74 of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894 (15 U.S.C. 8 and 9); and

(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a).

(3) The regulation promulgated under section 4(a) of this Act shall be forwarded on or before the date of its promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternative which would avoid or overcome such effects while achieving the purposes

of this Act.

(4) Whenever it is necessary, in order to comply with the provisions of this Act or the regulation or any orders under section 4 thereof, for owners, directors, officers, agents, employees, or representatives of two or more persons engaged in the business of producing, refining, marketing, or distributing crude oil, residual fuel oil, or any refined petroleum product to meet, confer, or communicate in such a fashion and to such ends that might otherwise be construed to constitute a violation of the antitrust laws, such persons may do so only upon an order of the President (or of an officer or agency of the United States to whom the President has delegated authority under section 5(b) of this Act); which order shall specify and limit the subject matter and objectives of such meeting, conference, or communication. Moreover, such meeting, conference, or communication

shall take place only in the presence of a representative of the Antitrust Division of the Department of Justice, and a verbatim transcript of such meeting, conference, or communication shall be taken and deposited, together with any agreement resulting therefrom, with the Attorney General and the Federal Trade Commission, where it shall be made available for public inspection.

(5) There shall be available as a defense to any action brought under the antitrust laws, or for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this Act or with the regulation or any order under section 4 of this Act.

(6) There shall be available as a

defense to any action brought under the antitrust laws arising from any meeting, conference, or communication or agreement resulting therefrom, held or made solely for the purpose of complying with the provisions of this Act or the regulation or any order under section 4 thereof, that such meeting, conference, communication, or agreement was carried out or made in accordance with the requirements of paragraph (4) of this subsection.

MONITORING BY FEDERAL TRADE COMMISSION

Sec. 7. (a) During the forty-five day period beginning on the effective date on which the regulation under section 4 first takes effect, the Federal Trade Commission shall monitor the program established under such regulation; and, not later than sixty days after such effective date, shall report to the President and to the Congress respecting the effectiveness

of this Act and actions taken pursuant thereto.

(b) For purposes of carrying out this section, the Federal Trade Commission's authority, under sections 6, 9, and 10 of the Federal Trade Commission Act to gather and compile information and to require furnishing of information, shall extend to any individual or partnership, and to any common carrier subject to the Acts to regulate commerce (as such Acts are defined in section 4 of the Federal Trade Commission Act).

Approved Nov. 27, 1973.